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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

JOSEPH ALTON BOWERS

Petitioner

versus

THE CONTINENTAL INSURANCE COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED

(1) Whether 28 U.S.C. §1332(c) allows a no-fault insurance lawsuit to be removed from a state court having proper jurisdiction and venue to the United States District Court, or whether such a case falls within the class of cases covered by the "direct action" proviso adopted by Congress in 28 U.S.C. §1332(c) to prevent an over abundance of insurance lawsuits of a local nature from being litigated in the federal court system.

(2) Whether the "stacking" of optional no-fault insurance benefits, that is the pyramiding of coverages from

different policies, is precluded by the Georgia Motor Vehicle Accident Reparations Act, O.C.G.A. Chap. 33-34.

(3) Whether a federal court may as a matter of law deny statutory penalties imposed by O.C.G.A. §33-34-6 for late payment of no-fault insurance benefits when it is undisputed that the insurance company owed the benefits, did not pay the benefits within the time permitted by the statute, and introduced no evidence to explain its conduct.

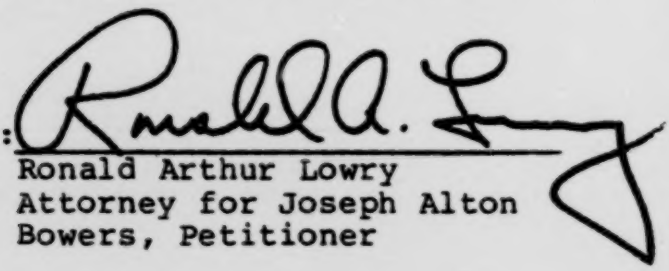
INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons are parties to the proceedings in the Court whose judgment is sought to be reviewed:

Joseph Alton Bowers, Petitioner

The Continental Insurance Company, Respondent

ZUSMANN, SMALL, STAMPS & WHITE
A Professional Corporation

By: 

Ronald Arthur Lowry
Attorney for Joseph Alton Bowers, Petitioner

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GROUNDS FOR WHICH SUPREME COURT JURISDICTION IS SOUGHT TO BE INVOKED

Petitioner seeks the Writ of Certiorari because the decision of the United States Court of Appeals for the Eleventh Circuit in the instant case rendered on February 27, 1985 (rehearing denied March 28, 1985) is in conflict with the decision of the United States Circuit Court of Appeals for the Sixth Circuit in the case of Ford Motor Co. v. Insurance Co. of North America, 669 F.2d 421 (6th Cir. 1982) on the jurisdictional question presented. Further, the decision in the instant case rewrites 28 U.S.C. §1332(c) by ignoring the plain language of that statute and has so far departed from the accepted and usual

course of judicial proceedings as to call for an exercise of this Court's power of supervision. The opinion in the instant case also rewrites O.C.G.A. Chapter 33-34 regarding the amount of no-fault insurance benefits to be awarded and the penalties upon an insurer for failure to pay no-fault insurance benefits in a timely manner. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On August 24, 1981, Plaintiff-Petitioner, Joseph Alton Bowers, was involved in a one car motor vehicle accident on Brumelow Road in North Fulton County, Georgia (R-245). As a result of that motor vehicle accident, Petitioner suffered devastating injuries including partial paralysis with some brain and spinal cord damage. Petitioner has not worked since the date of the accident and is permanently disabled from future employment (R-247). Petitioner's total medical expenses are now $103,198.14 (R-247).

Petitioner made a no-fault insurance claim against Aetna Insurance Company,

the insurer of the motor vehicle in which Petitioner was riding, for medical bills and lost wages incurred by him up to that time and received a total of $43,750.00[1] (R-247, R-189). By letter dated April 26, 1982, Petitioner made a no-fault insurance claim against Respondent, Continental Insurance Company, for those remaining benefits due to Petitioner based upon two policies of insurance issued by Continental Insurance Company to Petitioner on his personal

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[1] Under Georgia law the insurance policy insuring the automobile in which the injured person is riding has primary coverage. Policies on other vehicles under which the injured person is a named insured are treated as excess, or secondary, coverage. Petitioner received $5,000.00 in basic no-fault benefits plus $38,750.00 in optional no-fault benefits from Aetna by virtue of a compromise without filing suit.

vehicles (R-246). No response was made by Respondent to this letter (R-246).

Simultaneously with the April 26, 1982 letter, Petitioner sent Respondent copies of medical bills totalling in excess of $92,000.00, the amount of medical expenses known at that time. Suit was filed by Petitioner on July 27, 1982 pursuant to O.C.G.A. Chapter 33-34. On May 31, 1983, Respondent sent Petitioner a check in the amount of $6,250.00, attached to a Release and Dismissal of the case. On June 3, 1983, Petitioner returned the check, Release and Dismissal to Respondent. On October 20, 1983, after the trial court's ruling, Respondent tendered a check (which Petitioner accepted) in the amount of

$6,250.00 without attaching a Release or Dismissal as a condition of acceptance. The parties agreed that the acceptance of this amount would not preclude Plaintiff from going forward with Plaintiff's claims for additional amounts.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE BELOW

Petitioner filed suit against Respondent in the State Court of DeKalb County, Georgia (R-6). Respondent removed this case to the United States District Court for the Northern District of Georgia (R-4). Petitioner sought to have the case remanded to the State Court

of DeKalb County, Georgia (R-31, R-40) but Petitioner's Motion for Remand was denied by the trial court by an Order dated September 27, 1982 (R-66). Petitioner sought to obtain certification for an interlocutory appeal, however such certification was denied by the trial court by Order dated December 22, 1982 (R-90).

Respondent, Continental Insurance Company, answered Plaintiff's Complaint denying it owed Petitioner anything whatsoever and also filed a counterclaim for declaratory relief (R-17). After discovery, Petitioner filed his Motion for Summary Judgment or Alternatively for Partial Summary Judgment seeking his no-fault benefits from Respondent (R-179).

Respondent filed a Cross Motion for Declaratory Relief (R-199). Petitioner responded with a Brief in Opposition (R-228).

By Order dated October 4, 1983, the trial court denied Petitioner's Motion and granted Respondent's Motion, however the trial court in that Order also awarded Petitioner the sum of $6,250.00 (R-259). In that same Order, the trial court reserved the issue of Petitioner's attorney's fees, statutory penalties and punitive damages for a later determination (R-259). Petitioner filed a Notice of Appeal from that Order (R-272).

Subsequently, the trial court granted Respondent's Motion to Strike Petitioner's Request for Attorney's Fees,

Statutory Penalties and Punitive Damages, by Order dated January 13, 1984 (R-290). Petitioner filed a second Notice of Appeal from the judgment of January 13, 1984 (R-298). The two appeals were consolidated. On February 27, 1985, the panel of the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the trial court in this matter. On March 28, 1985, the United States Court of Appeals for the Eleventh Circuit denied Petitioner's Petition For Rehearing And Suggestion For Rehearing En Banc.

SUMMARY OF ARGUMENT

JURISDICTION. Petitioner originally filed suit against Respondent in a state court. Respondent removed the case to the United States District Court for the Northern District of Georgia. Petitioner sought to have the case remanded to the state court, which Motion for Remand was denied. Petitioner contends that under 28 U.S.C. §1332(c) the case should have been remanded because the federal court has no jurisdiction to hear this controversy. Specifically, the instant case falls within that class of cases covered by the "direct action" proviso adopted by Congress to prevent an over abundance of

insurance lawsuits of a local nature from being filed in federal court.

STACKING QUESTION. The central issue of this appeal involves "stacking" optional benefits under no-fault coverages afforded by the Georgia Motor Vehicle Accident Reparations Act. Petitioner has medical expenses and lost wages in excess of all available coverages. Petitioner is attempting to mount insurance coverages on top of each other to the total limits of all policies. Respondent contends that Petitioner can only recover up to the limit authorized by law to be written for one policy. Petitioner argues that the Georgia statutory no-fault scheme allows this "stacking."

ATTORNEYS FEES, STATUTORY PENALTIES AND PUNITIVE DAMAGES. Attorney's fees, statutory penalties and punitive damages are authorized under the Georgia Motor Vehicle Accident Reparations Act if an insurer does not make payment of benefits on time. In this case, the insurer admitted at the time of filing of the trial court briefs that it owed Petitioner $6,250.00. Respondent later paid that figure to Petitioner under a stipulation that acceptance by Petitioner would not affect any of Petitioner's rights in this litigation. However, this payment was made more than one and one-half years after the initial demand by Petitioner and more than five months from the date Petitioner answered interrogatories giv-

ing financial information to Respondent from which exact calculations regarding the amount Respondent owed Petitioner could be ascertained, even if Respondent had not obtained this information previously.

The Georgia Motor Vehicle Accident Reparations Act requires that the insurer make payment within thirty days or be subjected to statutory penalties and attorney's fees, and if payment is made after sixty days, the insurer is subjected to punitive damages with the burden of proof upon the insurer that any delay came about in "good faith." No evidence has been introduced by the insurer regarding a reason for the delay. The Eleventh Circuit ruled that the insurer

acted in good faith as a matter of law. Petitioner contends that, at the very minimum, there exists a question of fact to be resolved by the trier of fact as to this issue.

ARGUMENT AND CITATION OF AUTHORITY

JURISDICTIONAL QUESTION

It is a general legal principle that statutes are to be strictly construed. This principle has been reaffirmed recently by this Court. See Tennessee Valley Authority v. Hill, 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed.2d 117 (1978); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 102 S. Ct. 3245, 73 L. Ed.2d 973 (1982); Consumer Product Safety

Commission v. GTE Sylvania, Inc., 447 U.S. 102, 100 S. Ct. 2051, 64 L. Ed.2d 766 (1980).

The initial issue for determination by this Court concerns the question of jurisdiction of the federal courts to hear the controversary presented by this case. Respondent, Continental Insurance Company, is a New York insurance carrier doing business in the State of Georgia and is properly subject to the jurisdiction and venue of the State Court of DeKalb County. Petitioner Bowers is a resident of DeKalb County, Georgia. No contention has been made by Respondent that it is not subject to the jurisdiction of the State Court of DeKalb County, but rather the removal petition sought to

have the subject litigation removed to the United States District Court pursuant to the provisions of 28 U.S.C. §1332 and §1441.

The above cited code sections authorize a defendant in a state court action to remove a case in which diversity of citizenship exists to the United States District Court. After establishing the class of cases having federal jurisdiction via diversity, 28 U.S.C. §1332 goes on to limit federal jurisdiction for certain cases involving insurance companies by the inclusion of the following proviso:

> Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is

> not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business. 28 U.S.C. §1332(c). (Emphasis theirs).

In the case at bar, Petitioner has filed a "direct action against the insurer of a policy or contract of liability insurance" and "to which action the insured is not joined as a party Defendant" as contemplated by the provisions of the statutory authority stated above, and as a result the case is not proper to be removed to the federal court system because no diversity exists under §1332(c).

The question of the removal of no-fault insurance cases filed in the state courts has been addressed previously. In an action similar to the case at bar, the United States District Court for the Eastern District of Michigan held as follows:

> There are a number of reasons why although not specifically passed to eliminate diversity in no-fault cases the proviso should apply to diversity so created. First, there can be no question that no-fault is still a part of an on going tort liability system. (Cites omitted). No-fault actions possess the hallmarks of direct actions. McMurry v. Prudential Property and Casualty Insurance Co., 458 F. Supp. 209 at p. 211 (E.D. Mich. 1978).

After first determining that it is appropriate to apply the language of the

proviso to a no-fault insurance lawsuit, the court in McMurry went on to conclude as follows:

> It is also apparent that the no-fault statute in Michigan is a species of direct action. The Michigan No-fault Insurance Act (cites omitted) represents a state reform that makes it possible to bring suit in certain cases directly against an insurer, rather than suing the tortfeasor in a common lawsuit. Federal courts hearing analogous worker's compensation cases have been satisfied that worker's compensation suits can be direct actions within the meaning of the proviso, that is, the case is immediate between the injured claimant and the insurer (cites omitted). Both no-fault and worker's compensation cases are similar to the original direct action statutes in that they both allow suit to be brought directly against an insurer as a result of state legislative action. McMurry, at p. 212.

The reasoning contained in McMurry has been adopted by the United States Court of Appeals for the Sixth Circuit in the case of Ford Motor Co. v. Insurance Company of North America, 669 F.2d 421 (11th Cir. 1982). In that case, the Court raised the jurisdictional question on its own motion at oral argument. Both sides urged the Court to uphold jurisdiction however the Court determined that no jurisdiction existed in the federal courts for this type of controversy.

> We conclude that the decisions in McMurry and Tyson contain the correct view of the applicability of the 1964 amendment to actions under the Michigan no-fault act. The impetus for the amendment was the situation which resulted when Louisiana and Wisconsin departed from the traditional practice of treating the

insured rather than the insurer as the real party in interest in automobile negligence cases. However, if its language encompasses other situations, we should not limit application of the amendment to the specific conditions which gave it birth. The language of the amendment is inclusive rather than exclusive: 'in any direct action against the insurer of a policy or contract of liability insurance . . . to which the insured is not joined as a party defendant . . . .' (Emphasis added). As has been noted earlier, MCLA §500.3135(2) abolished tort liability arising from the ownership, maintenance or use of a motor vehicle in Michigan. As a substitute for such tort liability, Michigan provided 'personal protection benefits' and 'property protection benefits' for those injured or suffering property damage arising out of the ownership, maintenance or use of such vehicles. These benefits are provided on a no-fault basis rather than on the basis of traditional tort liability, and actions to

> secure the benefits may be maintained directly against the insurer of the vehicle rather than the insured. The literal requirements for the application of the proviso are met. Ford Motor Co. v. Insurance Company of North America, 669 F.2d 421 at p. 425 (6th Cir. 1982).

In going further and explaining the reason for this ruling, the Ford court stated as follows:

> Unless the proviso is held to apply, the same 'back door diversity' which Congress eliminated by the 1964 amendment would be possible under no-fault. No-fault represents a latter-day attempt by the states to improve the mechanism for recovery by those injured and damaged in accidents arising out of the use of motor vehicles. Given Congress' reaction to earlier state legislation which permitted direct actions, no-fault should not be held to expand the jurisdiction of

federal courts. Ford, at pp. 425, 426 (1982).

At page 2247 (Appendix "A" pp. A-11, A-12) of the opinion in this case, the decision placed great weight upon the concept that the direct action proviso was passed to remedy the problem created by the passage of direct action statutes by the legislatures of Louisiana and Wisconsin:

> The proviso was passed in response to statutes authorizing actions against the holder of a contract of indemnity for liability by a wrongdoer to the plaintiff. See S. Rep. No. 1308, 88th Cong. 2d Sess. reprinted in [1964] U.S. Code Cong. & Ad News 2778, 278-279 . . .

The decision's reasoning is flawed. The question of limiting the direct action proviso to the classic situation presented by the Louisiana/Wisconsin

direct action statutes has been addressed previously by the United States Court of Appeals for the Fifth Circuit in Hernandez v. Travelers Insurance Co., 489 F.2d 721, 723 (5th Cir. 1974) and rejected:

> Reviewing this history, the appellee argues that Congress intended that the amendment should apply only to direct actions brought under statutes similar to the Wisconsin and Louisiana statutes - that is, statutes providing for direct actions in motor vehicle or in tort cases.
>
> We cannot accept this argument. Whatever may have been the specific evil prompting congressional action in 1964 Congress chose to remove all direct actions from the diversity jurisdiction. The language of the statute is not subject to a limitation to motor vehicle cases, or to cases where the insured's

liability is imposed by tort law. (Emphasis theirs.)

The case law previously decided by the United States Court of Appeals for the Fifth Circuit prior to the formation of the Eleventh Circuit has been adopted by the Eleventh Circuit. Bonner v. City of Prichard, Alabama, 661 F.2d 1206 (11th Cir. 1981).

The only reason for failing to give full meaning to a literal interpretation of a statute is that it would produce an absurd and unjust result which Congress could not have intended and which "would thwart the obvious purpose of of the statute." Griffin v. Oceanic Contractors, Inc., 102 S. Ct. 3245, 3250 (1982). However, such is not the situa-

tion presented by the case at bar. The stated purpose of the direct action proviso of 28 U.S.C. §1332(c) is to limit the jurisdiction of the federal courts to hear this very type of insurance dispute. In reaching its decision in Ford (a decision exactly opposite to the decision of the Eleventh Circuit in the instant case), the Sixth Circuit makes the following cogent observation:

> No-fault insurance had not been adopted in any jurisdiction when Congress enacted the 1964 amendment to §1332(c). However, in one respect, no-fault insurance operates in exactly the same way as the Louisiana and Wisconsin direct action statutes - it permits a person claiming injury or damage arising from the ownership or use of a motor vehicle to sue the insurer rather than the

owner or operator of the vehicle. Ford, at p. 425.

The Eleventh Circuit opinion in this case distinguishes Ford on the basis that, unlike Ford, the instant case involves a suit brought by an insured against his own insurer. However, this ignores the plain language of the statute. It is not the status of the insured as plaintiff which is dispositive of the issue raised by §1332(c). It is the status of the defendant as an insurer and the residence of the named insured under the policy of liability insurance which control.

The decision of the Eleventh Circuit in the instant case would produce absurd results. Under Georgia law, a pedestrian

injured in an automobile accident is covered by the liability insurance policy containing no-fault benefits applicable to the automobile which strikes him. Drawing the line where the decision in the instant case has drawn it (i.e., status of the "insured" as plaintiff in the case being dispositive), an injured driver suing the insurance company for no-fault benefits does present a case having federal jurisdiction via diversity, while an injured pedestrian suing the insurance company for no-fault benefits does not. Petitioner respectfully submits that this is not the proper manner in which to determine federal jurisdiction in no-fault insurance cases.

Nor is the argument that a no-fault insurance claim is not a "tort" claim in the classic sense dispositive of this issue either:

> Congress, when it used the terms 'direct action' and 'liability insurance' in the amendment to §1332(c), did not intend the amendment to apply only to traditional tort claims. Aetna Casualty & Surety Insurance Co. v. Greene, 606 F.2d 123, 126 (6th Cir. 1979).

Two of the three states encompassing the Eleventh Circuit have adopted the no-fault insurance system for automobile accident cases, specifically Florida and Georgia. Florida recently increased the minimum limits for no-fault insurance to $10,000.00. Georgia has had optional no-fault limits of $10,000.00 and above since 1975. The possibility now exists, under the Eleventh Circuit opinion in

in this case, for a flood of no-fault insurance disputes in Florida and Georgia to be litigated in the federal court system. As observed by the United States District Court for the Eastern District of Michigan:

> It is obvious that Michigan's no-fault act is the sort of legislation Congress intended to cover in the proviso. But for the change created by the Michigan State Legislature, there would be no apparent jurisdiction in federal court to hear accident cases of an essentially local nature. It cannot be argued that the Michigan legislature intended to have or even could have any effect on federal jurisdiction by reforming its tort laws. In particular, where there are larger federal interests at stake - in this case, reducing the overload on federal dockets - it is encumbent upon a federal court to apply the law to further the congressional policy. (Cites

> omitted). As an independent system, the federal courts must be concerned with the effect of a state law which disrupts the federal system (cites omitted) and places an undue burden on it. McMurry, at pp. 212, 213.

Petitioner respectfully suggests that certiorari should be granted on this jurisdictional question. In a concurring opinion at page 2249 (Appendix "A" p. A-21), one of the judges on the panel deciding this case shows some discomfort with the holding of the Court on this jurisdictional question:

> The instant case made me uneasy because it was not made plain at first why 'direct action' did not mean any and every 'direct action' in which the insurer was duly named as a defendant. This court says this would appear to be the result 'at first glance.' The reported cases seem to pass over rather lightly why this is not so on second and subsequent

> glances. I think perhaps they took it for granted and were not yet warned by the Supreme Court not to rewrite or vary statutory language whenever it seemed good to them to do so.

The decision in the case at bar rewrites 28 U.S.C. §1332(c) and should be reversed.

STACKING QUESTION

The central issue presented by this appeal is the question of "stacking" of additional (also called "optional") PIP (also called "no-fault") coverages, that is, mounting the coverages afforded by one policy on top of coverages afforded by another policy.

In 1974 the General Assembly of Georgia enacted the Georgia Motor Vehicle Accident Reparations Act which is codified at O.C.G.A. Chapter 33-34. In enacting this legislation, the General Assembly changed the scheme for the compensation of injuries sustained in automobile accidents in the State of Georgia. Under this new "no-fault" plan, all persons operating motor vehicles in the State of Georgia were required to maintain insurance on their automobiles or trucks, and all insurance companies were required to write no-fault coverage for

each motor vehicle liability policy with a minimum no-fault coverage limit of $5,000.00 per injured person per accident. Under O.C.G.A. §33-34-5, persons were given the right of purchasing additional coverage on an optional basis with the highest amount of optional coverage to be written on a single policy being $50,000.00. In the instant case, it is undisputed that Petitioner is an insured under three policies applicable to this accident. The first policy, written by Aetna Insurance Company, insured the truck in which Petitioner was riding. Under Georgia law, the policy

insuring that motor vehicle is primary. The Aetna policy paid Petitioner $43,750.00.[2] Petitioner also had two separate policies with Respondent, Continental Insurance Company, on two individual automobiles which he owned. By operation of law, each Continental policy provides $5,000.00 in minimum limit no-fault protection and $45,000.00 in optional limit no-fault protection. It is undisputed that Petitioner has medical bills and lost wages in excess of all coverages afforded by all policies. Thus the total amount of the optional

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[2] This amount is as a result of a compromise with Aetna. The amount of the Aetna policy including minimum coverage and optional no-fault coverages offered by operation of law was $50,000.00.

coverages afforded by Petitioner's insurance policies with Respondent should be recovered by Petitioner in this case.[3] The Aetna policy discussed previously provides coverages to Petitioner by reason of his physically being inside the motor vehicle at the time of the accident. The two policies issued by Respondent, Continental Insurance

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[3] Petitioner originally filed suit for $42,419.16 plus $10,604.79 as statutory penalties, plus punitive damages and attorney's fees. On October 21, 1983, after all special damages were ascertained, Petitioner amended his Complaint to seek $90,000.00 in insurance benefits, $22,500.00 as statutory penalties, plus punitive damages and attorney's fees.

Company, provide coverage to Petitioner by virtue of his being a "named insured" under the two policies.[4]

The resolution of this stacking question calls for the construction of four sections of the Georgia Motor Vehicle Accident Reparations Act, specifically, O.C.G.A. §33-34-4(a)(2), O.C.G.A. §33-34-4(c), O.C.G.A. §33-34-2(5) and O.C.G.A. §33-34-5. (See Appendix "C").

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[4] Under Georgia law, "stacking" of optional no-fault coverages from one policy above coverages from another policy has long been allowed. See Georgia Farm Bureau Mutual Insurance Co. v. Musgrove, 153 Ga. App. 690, 266 S.E.2d 228 at p. 229 (1980). The question before this Court deals with Respondent's contention that a "cap" exists whereby Petitioner is not entitled to recover optional no-fault insurance benefits above the highest amount authorized by the no-fault statute to be written under a single policy.

The "stacking" issue of this appeal has been addressed by the Supreme Court of South Carolina in the case of Belk v. Nationwide, 244 S.E.2d 744 (S.C. 1978), a case similar to the case at bar but decided under South Carolina law. The plaintiff, Belk, was injured in an automobile accident and was insured by two policies both written by Nationwide. Each policy, pursuant to South Carolina law, provided basic personal injury protection benefits (PIP) in the amount of $1,000.00 and additional personal injury protection benefits (APIP) in the amount of $4,000.00 for a total coverage of $5,000.00 under each policy. Belk filed suit claiming he was entitled to $10,000.00 by virtue of "stacking" both

policies as his medical bills and lost wages exceeded $10,000.00.

Nationwide argued that it was only obligated to pay a maximum of $5,000.00 under the first policy and had no liability under the second policy. Nationwide's argument was that a section of the South Carolina law prevented plaintiff's recovery of benefits for more than one policy, and Nationwide had a clause in its policies excluding such additional coverage. The section of the South Carolina No-fault law in question, §56-11-110 of The 1976 Code of South Carolina, is similar to the Georgia no-fault section, §33-34-4(c) cited previously herein.

> "Notwithstanding any other provision of this chapter, no person shall recover benefits under the coverages required in §56-11-110 from more than one such policy of liability insurance or insurer on either a duplicate or supplemental basis." §56-11-110 of The 1976 Code of South Carolina.

The plaintiff countered with the argument that the statute cited by Nationwide would, at most, prohibit recovery of basic PIP a second time and that the APIP (also known as "optional" PIP) in the amount of $4,000.00 would still be payable.

The lower court awarded plaintiff the entire amount of the second policy. The Supreme Court of South Carolina ruled:

> "We hold that the lower court erred in concluding that

> Belk could recover the basic $1,000.00 PIP benefits under the second policy, but we affirm its award of the $4,000.00 APIP benefits under the second policy." Belk, at p. 746.

The rationale behind the South Carolina Supreme Court's decision was that §56-11-110 of The 1976 Code of South Carolina cited by Nationwide only prevented stacking of two basic PIP coverages but did not prevent stacking of the additional PIP, thus any exclusion in the policy which purported to prevent stacking of the additional PIP was void. Belk serves to illustrate the distinction between basic PIP and additional or optional PIP. In the case now before this Court, O.C.G.A. Chapter 33-34 and the policy language of the Continental

policies only prevent stacking of basic PIP benefits. The result should be the same in the instant case as in Belk, specifically Petitioner should be allowed to recover the additional PIP from both policies, but not basic PIP.

As Petitioner has previously received the minimum no-fault limits of $5,000.00 as part of Aetna's payment to him, the minimum no-fault limits of $5,000.00 under the two Continental policies cannot be recovered. However, the additional optional benefits under those two policies in the amount of $45,000.00 each would be recoverable with the total limit for both policies being $90,000.00. Since Respondent has conceded it owed Petitioner a portion of the

amount claimed and has paid Petitioner $6,250.00, Respondent now owes Petitioner $83,750.00.

Georgia law requires that Petitioner be entitled to stack coverages in this case. It is Petitioner's position that the various sections of the Georgia Motor Vehicle Accident Reparations Act are to be construed together. In examining these Code Sections, it is apparent that they fit together to form a comprehensive package of benefits. Specifically, O.C.G.A. §33-34-4(a)(2) provides for the minimum coverages to be afforded under the Georgia no-fault law. O.C.G.A. §33-34-5(a) provides for optional PIP up to an additional $45,000.00 for a total under any one policy of $50,000.00.

O.C.G.A. §33-34-2(5) limits the minimum PIP coverage available to an injured person by defining the term "insured" to include a person injured by an automobile "when such motor vehicle is not similarly insured as required" by O.C.G.A. §33-34-4(a)(2), thus making such a person not an "insured" under any other policies. O.C.G.A. §33-34-4(a)(2) refers only to minimum PIP limits. Additional, or optional, PIP is provided for under O.C.G.A. §33-34-5(a). The limiting language only prevents stacking of minimum limit no-fault insurance of $5,000.00.

Thus, under the definition of the word "insured" found in the Georgia no-fault law, the injured party has coverage for the minimum limits under his personal

policy only when the automobile from which he ordinarily would receive no-fault coverage is not insured for the minimum limits. No such restriction appears with regard to optional limits under O.C.G.A. §33-34-5(a). Statutes are to be strictly construed. Since O.C.G.A. §33-34-2(5) itself does not preclude one from being an "insured" for the optional limits as it does for the minimum limits then stacking of optional limits ought to be allowed. If the legislature had wanted to prevent stacking of the optional benefits the legislature would have also included a reference to the optional limits section of the no-fault law in the limiting language of O.C.G.A. §33-34-2(5)

thereby removing a person attempting to stack optional no-fault from the definition of "insured."

In reaching its conclusion in Belk, the Supreme Court of South Carolina employed a similar analysis:

> Section 56-11-150 refers only to the coverage required in §56-11-110, i.e., the basic $1,000.00 PIP coverage. The limiting statute makes no reference to APIP benefits which are required to be made available by §56-11-120, and in the absence of legislative intention indicating otherwise, we refuse to hold that the legislature intended to prevent an insured from recovering APIP benefits under more than one policy. Belk, at p. 746.

The Supreme Court of Georgia, Georgia's highest court, has not yet ruled on the stacking question presented by Petitioner in this case. One panel of

an intermediate appellate court, the Georgia Court of Appeals, has addressed this issue adversely to the position of Petitioner in Voyager Casual y Insurance Co. v. King, 172 Ga. App. 269, 323 S.E.2d 4 (1984). However, the Voyager decision does not address the proper construction of these statutes in combination but rather fixes on the language of O.C.G.A. §33-34-4(c) alone. The Voyager court misreads O.C.G.A. §33-34-4(c) because of its failure to take into consideration the other statutes.

O.C.G.A. §33-34-4(c) is subject to two meanings. Specifically, that statute can be read to mean:

(1) That the recovery of no-fault "shall not exceed the sum of .

$5,000.00 . . . or such greater amount of coverages has been purchased on an optional basis" under any one policy "regardless of the number of insurers providing such benefits or of the number of policies providing such coverages;" or

(2) That the recovery of no-fault "shall not exceed the sum of $5,000.00 . . . regardless of the number of insurers providing such benefits or of the number of policies providing such coverage" but an injured person can recover "such greater amount of coverage as has been purchased on an optional basis . . . regardless of the number of insurers providing such benefits or the

number of policies providing such coverage."

Petitioner respectfully submits that Voyager was simply decided incorrectly. In order to determine which of the two interpretations of O.C.G.A. §33-34-4(c) is correct the other statutes must be considered as well. The highest Court in Georgia, the Supreme Court of Georgia, has never addressed this issue. The Supreme Court of Georgia has reversed the Court of Appeals repeatedly on questions involving construction of the Georgia Motor Vehicle Accident Reparations Act. See Flewellen v. Atlanta Casualty Co., 250 Ga. 709, 300 S.E.2d 673 (1983); St. Paul Fire & Marine Insurance Co. v. Nixon, 252 Ga. 469, 314 S.E.2d 215

(1984); Wiard v. Phoenix Insurance Co., 251 Ga. 698, 310 S.E.2d 221 (1983); Enfinger v. International Indemnity Co., 253 Ga. 185, 317 S.E.2d 816 (1984); Government Employees Insurance Co. v. Mooney, 250 Ga. 760, 300 S.E.2d 799 (1983); Tolison v. Georgia Farm Bureau Mutual Insurance Co., 253 Ga. 97, 317 S.E.2d 185 (1984); Colwell v. Voyager Casualty Insurance Co., 251 Ga. 744, 309 S.E.2d 617 (1983).

Recently, the Eleventh Circuit certified a question to the Supreme Court of Georgia concerning the construction of the Georgia no-fault statute on a point different from that presented by the instant case. See United States v. Travelers Indemnity Co., 253 Ga. 328, 320

S.E.2d 164 (1984). However, in the case at bar the Eleventh Circuit chose not to send a certified question to the Supreme Court of Georgia concerning this issue despite Petitioner's Motion that such a certified question be presented.

The decision by the Eleventh Circuit Court of Appeals in the instant case on the issue of stacking of optional no-fault benefits is wrong for two reasons:

(1) The decision of the Eleventh Circuit Court of Appeals does not analyze the statutory framework necessary to reach the correct decision as would the highest court of the State of Georgia, but rather merely adopts the decision of an intermediate appellate court which, as

has been pointed out previously in this Brief, was decided incorrectly.

(2) The decision by the Eleventh Circuit Court of Appeals in the instant case is morally wrong. The net effect of this decision is that all persons in the State of Georgia who have more than one insurance policy under which they are named insureds for purposes of optional no-fault benefits have received nothing in return for premiums paid for optional no-fault under one of the policies. For example, if a person owns two automobiles and has purchased minimum and optional no-fault benefits for the first automobile totalling $50,000.00, and minimum and optional no-fault benefits for the second automobile totalling $50,000.00,

and that person receives a serious injury in an automobile accident resulting in medical bills in excess of $100,000.00, under the decision of the Eleventh Circuit Court of Appeals in the instant case that person will not receive one cent in no-fault benefits from the second policy. In short, the insured has paid a premium and received nothing in return.

Petitioner respectfully urges this Court to grant certiorari and reverse the decision of the Eleventh Circuit Court of Appeals on this issue.

STATUTORY PENALTIES

The Eleventh Circuit is mistaken in finding as a matter of law that Petitioner was not entitled to attorney's fees, statutory penalties or punitive damages. O.C.G.A. §33-34-6 provides that an insurer must make payment within thirty days of the claim to avoid penalties and attorney's fees and within sixty days to avoid punitive damages. (See Appendix "C").

The test under the Georgia no-fault statute is one of good faith of the insurer. The burden of proving such good faith is on the insurer. The fact that an issue may be one of first impression

does not insulate an insurance company from liability for bad faith for failure to timely pay a claim. Bitumuous Casualty Corp. v. Mowery, 145 Ga. App. 45, 244 S.E.2d 573 (1978).

The Eleventh Circuit opinion cites cases which placed the burden of proving bad faith on the plaintiff, rather than on the insurance company defendant as does the no-fault statute. The cases cited also do not support the conclusion reached in the opinion.

In the instant case, it is undisputed that Petitioner sent Respondent a demand on April 26, 1982 and that suit was filed on July 27, 1982, a period in excess of ninety days. It is during this period that the insurer should have

investigated to determine the validity of the claim. Instead, Respondent chose to do nothing and has introduced no evidence whatsoever that it conducted any investigation into the validity of this claim during that period.

> It has also long been established as the rule that the complete failure of the insurer to prove any defense to an action on the policy is evidence of the bad faith contemplated by Code §56-706, and subjects the insurer to a verdict for the statutory penalty and attorney's fees. (Cites omitted). This is especially true where the insurer does not prove that reasonable investigation of the insured's claim was made within the sixty day period after demand for payment, in terms of the statute, has been made. Reserve Life Insurance Co. v. Ayers, 217 Ga. 206 at p. 213, 121 S.E.2d 649 at p. 654 (1961).

At page 2248 of the decision (Appendix "A" p. A-19), the Eleventh Circuit makes the following incorrect factual observation:

> "It is undisputed that during this time Continental reasonably believed that Aetna had paid Bowers $50,000.00 rather than $43,750.00."

Literally pages and pages of argument have been submitted by Petitioner as to the lack of reasonableness on the part of Respondent after receipt of Petitioner's April 26, 1982 demand letter. Respondent did not even contact Petitioner's counsel or conduct an investigation about the claim. Respondent totally ignored the demand letter, never sending a reply. Even after Petitioner did Respondent's work for it, by providing in

Answers To Interrogatories a complete breakdown of the amounts paid to Petitioner by Aetna, Respondent still waited until after the trial court's ruling, a period of more than five months, before unconditionally paying Petitioner benefits which Respondent admits it owed all along.

Petitioner respectfully submits that, at the very least, a question of fact is present as to whether or not the insurer acted in good faith.

CONCLUSION

The decision of the United States Court of Appeals for the Eleventh Circuit in this case is of extreme significance

to the Eleventh Circuit and the nation. The jurisdictional question is one of first impression in the Eleventh Circuit, and the decision in this case is directly at odds with an earlier decision of the United States Court of Appeals for the Sixth Circuit concerning this identical issue. By rewriting 28 U.S.C. §1332(c), the Eleventh Circuit decision opens the door for the introduction of literally thousands of insurance lawsuits of essentially a local nature into the federal court system.

The decision in the instant case deprives thousands of persons of no-fault insurance protection for which those persons have already paid millions of dollars in premiums. The decision places

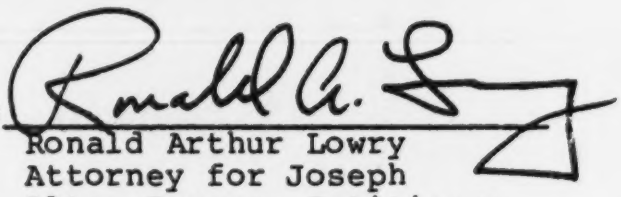
an arbitrary maximum of $50,000.00 upon no-fault insurance recoveries in Georgia no matter how much optional no-fault insurance coverage has been purchased by the insured.

The Eleventh Circuit decision also rewrites a Georgia statute, O.C.G.A. §33-34-6, to do away with the burden of proof on the insurer to establish that it had acted in good faith. Without any evidence in the record concerning the Respondent insurance company's activities, the opinion in this case presupposes good faith on the part of Respondent.

Petitioner, Joseph Alton Bowers, respectfully requests that this Court

grant certiorari on this matter and further requests that this Court reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

ZUSMANN, SMALL, STAMPS & WHITE
A Professional Corporation

By: 
Ronald Arthur Lowry
Attorney for Joseph
Alton Bowers, Petitioner

APPENDICES

APPENDIX "A"

JOSEPH ALTON BOWERS

Plaintiff-Appellant

v.

CONTINENTAL INSURANCE COMPANY

Defendant-Appellee

United States Court of Appeals,
Eleventh Circuit

February 27, 1985

Appeals from the United States District Court for the Northern District of Georgia.

Before HENDERSON and HATCHETT, Circuit Judge, and NICHOLS*, Senior Circuit Judge.

Albert J. HENDERSON, Circuit Judge:

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*Honorable Phillip Nichols, Jr., U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Joseph Alton Bowers sued the Continental Insurance Company (Continental) to recover certain optional person injury protection (PIP) benefits allegedly due him under two no-fault policies issued by Continental. The United States District Court for the Northern District of Georgia granted Continental's motion for summary judgment and motion to strike Bowers' request for attorney's fees, statutory penalties and punitive damages. We affirm.

Bowers is covered by two Continental no-fault insurance policies, each providing $5,000.00 in basic and $45,000.00 in optional PIP coverage. On August 24, 1981, while riding in a truck insured by the Aetna Insurance Company (Aetna), he

was involved in an accident as the result of which he incurred over $100,000.00 in medical expenses.

Aetna paid to Bowers $43,750.00 in PIP benefits.[1] During negotiations, Continental took the position that Bowers' total PIP recovery from Continental and Aetna could not exceed $50,000.00, the greatest amount of coverage available under any one of the policies.[2] Because Continental originally believed that Aetna paid the amount of $50,000.00, it claimed that

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[1] The benefits included $5,000.00 for basic PIP coverage and $38,750.00 for optional PIP coverage.

[2] See, e.g., Supp. Record, vol. 1, p. 12 (letter); Record at 266 (joint status report).

it was not indebted to Bowers for an additional amount.[3]

Bowers submitted copies of medical bills in excess of $92,000.00 along with a demand letter to Continental on April 26, 1982. On July 27, 1982, he filed a complaint in the State Court of DeKalb County, Georgia, against Continental seeking $42,419.10 in insur-

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[3] On April 26, 1982, Bowers' attorney sent a letter to Continental in which he stated that "my client has previously recovered personal injury protection benefits exhausting the $50,000 statutory amount of that policy from the insurance carrier insuring the motor vehicle which my client was operating at the time of the accident of August 24, 1981." Record at 29; see also Record at 171 (Continental's Response to Order of March 28, 1983) ("plaintiff received $50,000 in personal injury protection no fault benefits under the Aetna policy"). Bowers does not challenge Continental's original belief that Aetna paid him $50,000.00.

ance benefits and, because of the lateness of the payment allegedly due from Continental, a statutory penalty of $10,604.79, reasonable attorney's fees and punitive damages. Continental removed the case to the United States District Court for the Northern District of Georgia on the grounds of diversity. The district court later denied Bowers' motion to remand the case back to the state court.

On May 2, 1983, Continental learned that Aetna had paid only $43,750.00 in PIP benefits to Bowers.[4] Upon

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[4] The true amount of Aetna's payment was contained in Bowers' answers to Continental's interrogatories. These answers were mailed on April 29, 1983, and filed in the district court May 2, 1983. See Record at 189-93.

receipt of this information, Continental conceded that it owed Bowers the sum of $6,250.00, the difference between $50,000.00, the greatest amount of coverage available under any one of the policies, and Aetna's payment.[5] On May 31, 1983, Continental tendered a check for $6,250.00, but conditioned its acceptance on Bowers' release of all further claims against Continental.[6] Eventually, after Bowers refused to accept the payment, Continental forwarded another check for the same amount on

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5 See note 2, supra.

6 The tendered check contained a statement that the payment was for the "[r]elease of all claims on [Bowers' policy]." Supp. Record, vol. 1, p. 14. The check was accompanied by a release form and a draft order of dismissal. Id. at 15-16.

October 20, 1983, without the release provision.

The district court granted Continental's motion for summary judgment, and awarded Bowers $6,250.00, the amount Continental conceded it owed. In a later order the court granted Continental's motion to strike Bowers' request for attorney's fees, statutory penalties and punitive damages. This appeal followed.

Bowers first argues that the district court erred in denying his motion to remand the case back to the state court. According to Bowers, the suit was not removable because it falls under the direct action provision of 28 U.S.C. §1332(c):

> [I]n any direct action against the insurer of a policy or contract of liability insurance ... to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

28 U.S.C. 1332(c). Bowers argues that the district court lacked jurisdiction because, under the statute, his domicile must be imputed to Continental, thus destroying diversity.

At first glance, the literal language of the statute appears to support Bowers' contention. It is generally accepted that claims under no-fault insurance contracts may be considered "direct actions" within the meaning of

section 1332(c). See, e.g. Ford Motor Co. v. Insurance Co. of North America, 669 F.2d 421, 425-26 (6th Cir. 1982); McMurry v. Prudential Property and Casualty Insurance Co., 458 F. Supp. 209, 212-13 (E.D. Mich. 1978). Moreover, it is undisputed that this suit is "against the insurer of a policy ... of liability insurance," and that Bowers, the insured is "not joined as a party defendant."

Nonetheless, we do not believe that section 1332(c) applies to this action. The general rule has always been that the direct action proviso does not affect suits brought by an insured against his own insurer. See, e.g. White v. United States Fidelity and Guaranty Co., 356 F.2d 746, 747-48 (1st Cir. 1966). We are

aware of no authority to the contrary.[7] The proviso was passed in response to statutes authorizing actions against the holder of a contract of

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[7] Although constituting direct actions, the cases cited as contrary authority did not involve an insured suing his own insurer. For example, Ford Motor Co. v. Insurance Co. of North America, 669 F.2d 421 (6th Cir. 1982), was a suit against a resident tortfeasor's nonresident insurer. Although the Court held that Michigan's no-fault law acted as a "direct action" statute, the case was not one of an insured suing his own insurer. Similarly, in McMurry v. Prudential Property and Casualty Ins. Co., 458 F. Supp. 209 (E.D. Mich. 1978), an automobile passenger sued the owner-driver's no-fault insurer. In fact, the court explicitly stated that the proviso should apply, "at least ... where the named insured is not the plaintiff." Id. at 211. Finally, in Tyson v. Connecticut General Life Ins. Co., 495 F. Supp. 240 (E.D. Mich. 1980), the plaintiff sued the insurance company under contract to her employer to provide disability coverage.

indemnity for liability by a wrongdoer to the plaintiff. See S. Rep. No. 1308, 88th Cong., 2d Sess. reprinted in [1964] U.S. Code Cong. & Ad. News 2778, 2778-79; see also Spooner v. Paul Revere Life Insurance Co., 578 F. Supp. 369, 373 (E.D. Mich. 1984) (The direct action proviso is triggered by when "the act for which liability is sought to be imposed against the insurance company is the same act for which liability could be imposed against the insured."). In similar situations involving suits by an insured against his own insurer under an uninsured motorist policy, courts have held that section 1332(c) does not control. See, e.g. Adams v. State Farm Mutual Automobile Insurance Co., 313 F. Supp.

1349 (N.D. Miss. 1970); Bishop v. Allstate Insurance Co., 313 F. Supp. 875 (W.D. Ark. 1970). Accordingly, the district court did not err in denying Bowers' motion to remand.

Bowers next claims that he is entitled to recover PIP benefits in an amount greater than $50,000.00, the highest coverage on any one policy. In Voyager Casualty Insurance Co. v. King, 172 Ga. App. 269, 323 S.E.2d 4 (1984), cert. denied, No. 41655 (Ga., Nov. 6, 1984), the Georgia Court of Appeals resolved a previously unanswered question of state law by holding that optional PIP benefits could not be "stacked" to permit recovery in an amount greater than the highest coverage under any one policy.

As a result of this recent pronouncement by the state appellate court, Bowers is not entitled to additional benefits.[8]

Finally, Bowers asserts a claim for statutory penalties, attorney's fees and punitive damages. Georgia law provides that insurance benefits must be paid within thirty days after the insurer

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[8] Basic PIP coverage may not be "stacked" under Georgia law. See, e.g., Georgia Casualty & Surety Co. v. Waters, 146 Ga. App. 149, 246 S.E.2d 202 (1978). Here, Bowers contends that the optional PIP coverages may be "stacked." Under Voyager, however, he may recover optional benefits only up to the highest amount of optional PIP coverage afforded in any one policy, or $45,000.00. Since Aetna paid to Bowers only $38,750.00 in optional coverage, Continental admits it owes the remaining $6,250.00. The $5,000.00 difference between these figures and those used for convenience in the opinion is the basic PIP coverage paid to Bowers.

receives reasonable proof of the fact and amount of the loss obtained or the insurer shall be liable for a penalty not exceeding twenty-five percent of the amount due plus reasonable attorney's fees. In addition, if the delay exceeds sixty days the insurer is subject to punitive damages. In either case, the insurer may avoid liability by proving

that the failure to pay was in good faith. O.C.G.A. §33-34-6.[9]

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[9] Georgia law provides:

(b) Benefits required to be paid without regard to fault shall be payable monthly as loss accrues. The benefits are overdue if not paid within 30 days after the insurer receives reasonable proof of the fact and the amount of loss sustained.... In the event the insurer fails to pay each benefit when due, the person entitled to the benefits may bring an action to recover them and the insurer must show that its failure or refusal to pay was in good faith, otherwise the insurer shall be liable for a penalty not exceeding 25 percent of the amount due and reasonable attorney's fees.

(c) In addition to all other penalties provided for in this Code section, in the event an insurer fails or refuses to pay a person the benefits which the person is entitled to under this chapter within 60 days after proper proof of loss has been filed, the person may bring an action to recover the benefits; and, if the insurer fails to prove that its failure or refusal to pay the benefits was in good faith, the insurer shall be subject to punitive damages.
O.C.G.A. §33-34-6(b), (c).

Bowers contends that Continental is liable for these statutory penalties, attorney's fees and punitive damages because it failed to pay him the $6,250.00 it admitted it owed within the requisite time period.[10]

In interpreting this statute, a part of Georgia's no-fault automobile insurance act, Georgia courts have drawn on cases construing O.C.G.A. §33-4-6, a similar law applying generally to bad faith refusals to pay by insurers. See,

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[10] Bowers' claim for statutory damages attributable to Continental's refusal to pay an amount greater than $6,250.00 is without merit given the holding of the Georgia Court of Appeals in Voyager establishing that he is not entitled to this additional amount.

e.g., Bituminous Casualty Corp. v. Mowery, 145 Ga. App. 45, 244 S.E.2d 573 (1978). Georgia courts read this latter statute as requiring, as a condition to recovering bad faith damages, that the 30- or 60-day period lapse before the before the date suit is filed. See, e.g., Life Insurance Co. v. Burke, 219 Ga. 214, 222, 132 S.E.2d 737, 742 (1963); Cotton States Mutual Insurance Co. v. Clark, 114 Ga. App. 439, 446, 151 S.E.2d 780, 786 (1966). Because Bowers submitted his initial demand letter and adequate proof of loss on April 26, 1982, he may recover statutory damages only if Continental refused in bad faith to pay the $6,250.00 for thirty or sixty days after this date but before July 27, 1982, when he filed suit. A period of bad faith

withholding after suit is filed is insufficient under Georgia law.[11]

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[11] An insured may salvage a premature suit for statutory damages by dismissing it and refiling, see Piedmont Southern Life Ins. Co. v. Gunter, 108 Ga. App. 236, 132 S.E.2d 527 (1963) (dismissal did not prejudice the defendant's opportunity to pay the claim without liability for attorney's fees); Massachusetts Mutual Life Ins. Co. v. Montague, 63 Ga. App. 137, 10 S.E.2d 279 (1940) (amendment not permitted), or perhaps by filing an amendment in accordance with the liberalized Georgia Civil Practice Act. See generally Developments in Georgia Law-Insurance, 13 Ga. L. Rev. 850, 947 (1979). In this case, Bowers did neither.

We also note that there are some differences in the statutory language of O.C.G.A. §33-34-6, which is applicable here, and O.C.G.A. §33-4-6, from which we draw controlling precedent. For example, the former statute shifts the burden to the insurer to show good faith. None of these differences, however, lead us to conclude that Georgia courts would construe the former statute differently from the latter on the issues relevant to this case.

Continental has met its burden of showing good faith in withholding payment of the $6,250.00 between April 26, 1982, and July 27, 1982. It is undisputed that during this time Continental reasonably believed that Aetna had paid Bowers $50,000.00 rather than $43,750.00.[12] The district court did not err in granting Continental's motion to strike Bowers' request for statutory damages.

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12 See note 3, supra. Although the question of good or bad faith is generally for the jury, it may properly be decided by the court when there is no evidence of a frivolous or unfounded refusal to pay. See Georgia Farm Bureau Mutual Ins. Co. v. Pendley, 155 Ga. App. 674, 677-78, 272 S.E.2d 540, 543 (1980). Here, Bowers does not dispute the reasonableness of Continental's original belief that Aetna paid him the full $50,000.00.

AFFIRMED.

NICHOLS, Senior Circuit Judge, concurring:

I join in the opinion, but would add the following:

The Supreme Court has in recent years made quite a point of always giving federal statutes their literal interpretation as written, absent special factors such as reaching an absurd result, associated with pretty plain indications that Congress intended something different and of lesser scope. Such well known cases have so held as Tennessee Valley Authority v. Hill, 437 U.S. 153, 187 n. 33, 98 S. Ct. 2279, 2298 n. 33, 57 L. Ed.2d 117 (1978) (the snail darter case); Griffin v. Oceanic Contractors,

Inc., 458 U.S. 564, 102 S. Ct. 3245, 73 L. Ed.2d 973 (1982). The instant case made me uneasy because it was not made plain at first why "direct action" did not mean any and every "direct action" in which the insurer was duly named as a defendant. This court says this would appear to be the result "at first glance." The reported cases seem to pass over rather lightly why this is not so on second and subsequent glances. I think perhaps they took it for granted and were not yet warned by the Supreme Court not to rewrite or vary statutory language whenever it seemed good to them to do so.

The answer here is that from the beginning of §1332(c) "direct action" was

on the order of a term of art, not of one in common speech. It meant the right, given then by but two states, for motor vehicle tort plaintiffs to skip suing the tort feasor and sue directly his insurance carrier. Such appears in the legislative history. Senate Rep. No. 1308, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S. Code Cong. & Ad. News 2778. It calls such a statute a "direct action" statute, the words "direct action" in quotes at 2778. It refers to the two states as states which have "direct action" statutes. There is a detailed analysis of the spectacular effect of the Louisiana "direct action" statute upon the case load of the federal district courts in that state. The

The report ends with letters by Warren Olney and Deputy Attorney General Katzenbach, describing the bill as doing no more than eliminating from diversity jurisdiction suits on certain tort claims in which both parties are local residents but which, because of a state "direct action" statute, may be brought directly against a foreign insurance carrier.

This is the kind of thing I think the Supreme Court would accept as justifying a departure from its rule of strict and literal statutory construction.

To buttress further my belief that "direct action" and "direct action statutes" are, semantically, terms of art that refer not to any statute authorizing suit against an insurance company, but

only the special kind of which Louisiana and Wisconsin furnished the first examples, I refer to 12 Couch on Insurance 2d §45:775 & ff (1964) where such statutes are described and right away in §45:776 the writer starts calling them "direct action statutes." See also id, 1980 Supplement, §45:777 telling one that a direct action statute is not to be used to get an insurer into federal court when both the plaintiff and the insured are residents of the same state.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 83-8787 and 84-8084

JOSEPH ALTON BOWERS

Plaintiff-Appellant,

versus

CONTINENTAL INSURANCE COMPANY

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING ENBANC

(Opinion February 27, 1985, 11 Cir., 1985, _____ F.2d _____).

Before HENDERSON and HATCHETT, Circuit Judges and Nichols,* Senior Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of

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*Honorable Philip Nichols, Jr. U.S. Circuit Judge for the Federal Circuit sitting by designation.

the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Albert J. Henderson
United States Circuit Judge

APPENDIX "C"

O.C.G.A. §33-34-4(a)(2) states:

> (2) Compensation to insured injured persons without regard to fault up to an aggregate minimum limit of $5,000.00 per insured injured person for:
>
> (A) All necessary medical expenses, not to exceed $2,500.00, arising from a motor vehicle accident, including necessary medicine, drugs, and surgical, dental, X-ray, and rehabilitative services, including prosthetic devices, and necessary ambulance, hospital, and nursing services as prescribed, authorized, approved, or rendered by an attending physician, including any person licensed to practice a healing art and any remedial treatment and care rendered in accordance with a recognized religious healing method;
>
> (B) Eighty-five percent of the loss of income or earnings during disability with a maximum benefit of $200.00 per week;

(C) Expenses, not to exceed $20.00 per day, reasonably incurred during a period of disability in obtaining ordinary and necessary services from others, excluding members of the injured person's household, in lieu of services that, had he or she not been injured, the injured person would have performed not for income but for the benefit of his or her household; and

(D) Funeral services and burial expenses not to exceed $1,500.00 per person.

O.C.G.A. §33-34-4(c) states:

The total benefits required to be paid under this Code section without regard to fault as the result of any one accident shall not exceed the sum of $5,000.00 per each individual covered as an insured person or such greater amount of coverage as has been purchased on an optional basis as provided in Code Section 33-34-5, regardless of the number of insurers providing such benefits or of the number

of policies providing such coverage.

O.C.G.A. §33-34-2(5) states:

> 'Insured' means, in addition to the insured named in the policy, his spouse and children if residing in the same household, the relatives of either the insured or his spouse if residents of the named insured's household, any pedestrian struck by the insured vehicle, and any other person using or occupying the insured vehicle with the express or implied permission of the named insured or his spouse. The term shall also include named insured, his spouse, and any resident relative while a pedestrian or while occupying or when struck by a motor vehicle when such motor vehicle is not similarly insured as required by paragraph (2) of subsection (a) of Code Section 33-34-4.

O.C.G.A. §33-34-5(a) states in pertinent part:

> Each insurer shall also make available on an optional basis the following coverage:

(1) An aggregate limit of benefits payable without regard to fault up to $50,000.00 per person, which may be rejected or reduced to not less than an aggregate limit of benefits payable without regard to fault of $5,000.00 per person by written consent of the policyholder. . . .

O.C.G.A. §33-34-6 provides as follows:

(a) Payment of benefits required by this chapter must be made periodically on a monthly basis as expenses are incurred or, in the case of total disability, as disability continues.

(b) Benefits required to be paid without regard to fault shall be payable monthly as loss accrues. The benefits are overdue if not paid within 30 days after the insurer receives reasonable proof of the fact and the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof

is overdue if not paid within 30 days after proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after proof is received by the insurer. For the purpose of calculating the extent to which any benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail to the last known address in a properly addressed, post-paid envelope or, if not so posted, on the date of delivery. Basic no-fault payments may be paid by the insurer directly to persons or firms supplying necessary products, services, or accomodations to the claimant. In the event the insurer fails to pay each benefit when due, person entitled to the benefits may bring an action to recover them and the insurer must show that its failure or refusal to pay was in good faith, otherwise the insurer shall be liable for a penalty not exceeding 25 percent of the

amount due and reasonable attorney's fees.

(c) In addition to all other penalties provided for in this Code section, in the event that an insurer fails or refuses to pay a person the benefits which the person is entitled to under this chapter within 60 days after proper proof of loss has been filed, the person may bring an action to recover the benefits; and, if the insurer fails to prove that its failure or refusal to pay the benefits was in good faith, the insurer shall be subject to punitive damages.

CERTIFICATE OF SERVICE

This is to certify that I have this date served three copies of the foregoing PETITION FOR WRIT OF CERTIORARI upon the United States Court of Appeals for the Eleventh Circuit, 50 Spring Street, S.W., Atlanta, Georgia 30303-3147, and upon William S. Sutton, attorney for Appellee, Continental Insurance Company, McClain & Merritt, P.C., 1250 Tower Place, Atlanta, Georgia 30026-3901 by depositing same in

the United States Mail in a properly addressed envelope with adequate postage thereon.

This 10 day of May, 1985.

By: _____
Ronald Arthur Lowry
Attorney for Petitioner,
Joseph Alton Bowers

Sworn to and subscribed before me this 10th day of May, 1985.

_____
Notary Public

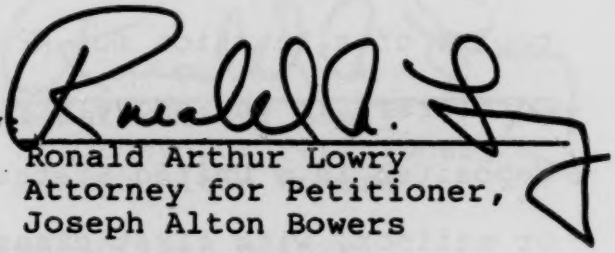
Notary Public, Georgia, State at Large
My Commission Expires June 3, 1986

STATEMENT

Pursuant to Rule 28.2 of the Rules of the Supreme Court, this statement certifies that the original and forty copies of a Petition for Writ of Certiorari in the above styled case were deposited in a United States post office or mailbox, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States. This mailing took place in Atlanta, Georgia on the afternoon of FRIDAY, May 10, 1985, within the time permitted by the Rules of the

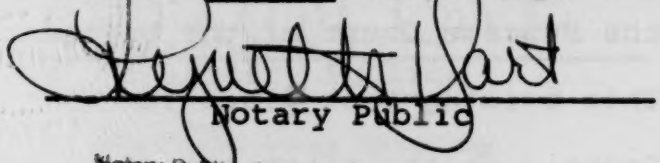
Supreme Court for the filing of a Petition for a Writ of Certiorari in this case.

Respectfully submitted,

By: 

Ronald Arthur Lowry
Attorney for Petitioner,
Joseph Alton Bowers

Sworn to and subscribed before me this 10th day of May, 1985.

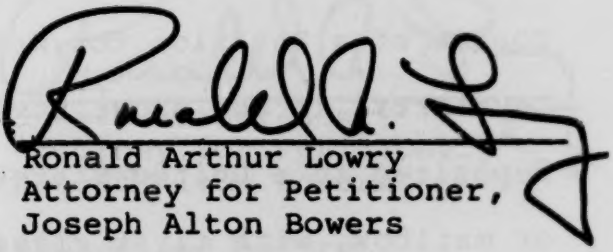


Notary Public

Notary Public, Georgia, State at Large
My Commission Expires June 3, 1986

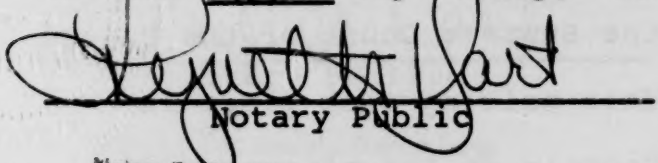
Supreme Court for the filing of a Petition for a Writ of Certiorari in this case.

Respectfully submitted,

By: 

Ronald Arthur Lowry
Attorney for Petitioner,
Joseph Alton Bowers

Sworn to and subscribed before me this 10th day of May, 1985.



Notary Public

Notary Public, Georgia, State at Large
My Commission Expires June 3, 1986

Office - Supreme Court, U.S.
FILED
MAY 29 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1787

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

JOSEPH ALTON BOWERS

Petitioner

versus

THE CONTINENTAL INSURANCE COMPANY

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

Ronald Arthur Lowry, Of Counsel
Attorney for Petitioner
ZUSMANN, SMALL, STAMPS & WHITE
A Professional Corporation
P.O. Box 53483
Atlanta, Georgia 30355
(404) 237-0071

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APPENDIX "D"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C82-1820

JOSEPH ALTON BOWERS

vs.

THE CONTINENTAL INSURANCE COMPANY

ORDER

Plaintiff brought this action against his automobile insurer in the State Court of DeKalb County and Defendant removed it to this Court, citing the Court's diversity jurisdiction. The case is before the Court on Plaintiff's Motion to Dismiss Petition for Removal.

Plaintiff argues that this case falls into the "direct action" provisio

(sic) of the diversity jurisdiction statute, 28 U.S.C. §1332(c), and therefore the Court has no jurisdiction. The Court rejected this argument in Morgan v. State Farm Insurance Companies, No. C81-2443 (N.D. Ga., February 11, 1982). For the reasons stated in Morgan, the Court DENIES Plaintiff's Motion to Dismiss Petition for Removal. The Clerk is DIRECTED to attach a copy of the Morgan opinion to this Order.

SO ORDERED, this 24 day of September, 1982.

Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C81-2443

RENEE B. MORGAN and RENATE HERBRAND, Individually and on behalf of all those persons within the State of Georgia similarly situated

vs.

STATE FARM INSURANCE COMPANIES

ORDER

This action is a dispute regarding insurance coverage. It is before the Court on Plaintiffs' Motion to Remand and on Defendant State Farm's Motion for a Protective Order.

Plaintiffs brought this action in the Superior Court of DeKalb County, Georgia. State Farm removed the action

to this Court, pursuant to 28 U.S.C. §1441(a), which grants State Farm the right to do so if the case could have been brought in this Court; State Farm alleges diversity of citizenship under 28 U.S.C. §1332. Although Plaintiffs purport to represent a class for diversity jurisdiction purposes, it is the citizenship of the named Plaintiffs that governs. See Snyder v. Harris, 394 U.S. 332, 340 (1969); Calagaz v. Calhoun, 309 F.2d 248, 253 (5th Cir. 1962). The named Plaintiffs are citizens of Georgia, while State Farm is an Illinois corporation with its principal place of business in Illinois. Plaintiffs do not dispute the fact that $10,000 is at issue, and ordinarily, therefore, there would be no

question that this action could have been brought in this Court under 28 U.S.C. §1332.

Plaintiffs contend that this is not an ordinary case, however, but falls within the exception to diversity jurisdiction provided by 28 U.S.C. §1332(c). That subsection provides, in relevant part:

> Provided further that in any direct action against the insurer of a policy or contract of liability insurance...to which action the insured is not joined as a party defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as the State by which the insurer has been incorporated and of the State where it has its principal place of business.

Plaintiffs contend that this is a direct action against an insurer to which the insured has not been joined as a defendant. As a result, according to Plaintiffs, State Farm is deemed to be a citizen of Georgia because its insureds, Plaintiffs themselves, are citizens of Georgia. Therefore, there is no diversity of citizenship.

Plaintiffs' reading of 28 U.S.C. §1332(c) puts the Court in an anomalous position of comparing the citizenship of Plaintiffs with the citizenship of Plaintiffs to test for diversity. The Court need not do this, however, because the legislative history of 28 U.S.C. §1332(c) makes it clear that the subsection was not intended to apply to

lawsuits brought by an insured against his own insurer.

> The purpose of the proposed legislation is to...eliminate under the diversity jurisdiction...suits on certain tort claims in which both parties are local residents, but which, under a State "direct action" statute, may be brought directly against a foreign insurance carrier without joining the local tortfeasor as a defendant.

S. Rep. No. 1308, 88th Cong., 2d. Sess. reprinted in [1964] U.S. Code Cong. & Ad. News 2778, 2778-79 (emphasis added). The legislation was intended only to apply to suits under "direct action" statutes, which permit an injured party to bring suit directly against the insurer of a tortfeasor. See id. at 2779. In essence, Congress intended to prevent

tort plaintiffs from entering the federal courthouse by the back door, by bringing suit directly against the insurer of the nondiverse tortfeasor. Several courts have held that a suit by an insured against his own insurance company is not a "direct action" within the meaning of the subsection 1332(c). E.g., White v. United States Fidelity and Guaranty Co., 356 F.2d 746, 747-48 (1st Cir. 1966); Fidelity and Deposit Co. v. Southern Utilities, Inc., 524 F. Supp. 692, 693 (M.D. Ga. 1981); O'Hanlon v. Hartford Accident and Indemnity Co., 439 F. Supp. 377, 380 (D. Del. 1977). This Court agrees with the reasoning of those opinions.

State Farm requests a protective order regarding three interrogatories served by Plaintiffs along with their Complaint. The interrogatories seek information regarding claims against State Farm by members of the purported plaintiff class. State Farm asserts that the requests are oppressive and unduly burdensome. Such information will be relevant only if the Court certifies a plaintiff class, and the Court will not require State Farm to produce it until that time.

Plaintiffs' Motion to Remand is DENIED. State Farm's Motion for a Protective Order is GRANTED.

Because this action was brought in state court, the Complaint does not

conform to Local Rule 220, which specifies the requirements for a class action complaint. The Court DIRECTS Plaintiffs to amend their Complaint within 20 days to comply with the requirements of Local Rule 220. Pursuant to the spirit of Local Rule 221.13, the time in which Plaintiffs must move to certify their class is EXTENDED until 90 days from the date of entry of this Order.

SO ORDERED, this 11 day of February, 1982.

Orinda D. Evans

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX "E"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C82-1820

JOSEPH ALTON BOWERS

vs.

THE CONTINENTAL INSURANCE COMPANY

ORDER

This action is before the Court on the Plaintiff's Motion for Interlocutory Appeal.

On July 27, 1982, the Plaintiff filed a Complaint in the State Court of DeKalb County, Georgia, claiming that he was a named insured under a no-fault insurance policy issued by the Continental Insurance Company. The Plaintiff also claimed that he had been

denied the opportunity to accept the maximum optional personal protection coverage as required by Georgia Code Annotated §56-3403(b). The Plaintiff sought to accept the continuing offer created in Jones v. State Farm Mutual Automobile Insurance Co., 156 Ga. App. 230, 274 S.E.2d 623 (1980), cert. dismissed as improvidently granted, 248 Ga. 46, 280 S.E.2d 837 (1981), overruled, Atlanta Casualty Co. v. Flewellen and Van Dyke v. Allstate Insurance Co., Nos. 64501 & 64511, slip. ops. (Ga. Ct. App. Dec. 1, 1982). The Plaintiff requested damages, a statutory penalty and attorney's fees.

On August 24, 1982, the Defendant filed a petition to remove the action to

the United States District Court for the Northern District of Georgia. The Plaintiff filed a Motion to Dismiss the Petition for Removal. In an Order entered September 27, 1982, the Court denied the Plaintiff's request to dismiss the petition for removal. The Plaintiff now requests that the Court amend this Order so that the Plaintiff can appeal the interlocutory Order.

An order denying remand of a case which has been removed to federal court

is not a final order within the meaning of 28 U.S.C. §1291,[1] but is an interlocutory Order. Poirrier v. Nicklos Drilling Co., 648 F.2d 1063, 1064-65 (5th Cir. 1981).[2] It cannot be appealed unless certified by the district

---

[1] Section 1291 of Title 28 states that:

> The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States ..., except where a direct review can be had in the Supreme Court.

[2] Decisions of the Fifth Circuit handed down prior to September 30, 1981, are binding precedent unless overruled or modified by the Eleventh Circuit en banc. Bonner v. City of Prichard, 661 F.2d 1206, 1209-10 (11th Cir. 1981).

court according to the provisions of 28 U.S.C. §1292(b). Poirrier, 648 F.2d at 1065.[3]

A party may seek the permission of the court of appeals to appeal an interlocutory order when a district judge in a civil action states that (1) the

---

[3] Section 1292(b) of Title 28 provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

order involves a controlling question of law, (2) there is substantial ground for difference of opinion respecting its correctness, and (3) immediate appeal from the order may materially advance the ultimate termination of the litigation. The district court judge must find that all three elements exist.

The Plaintiff in the instant case argues that there is a "substantial ground for difference of opinion" on the question of whether the district court has diversity jurisdiction to hear the instant case.[4] In support of this

---

[4] The Plaintiff argues that this case falls into the "direct action" proviso of the diversity action statute, 28 U.S.C. §1332(c), and that therefore this Court has no jurisdiction.

allegation, the Plaintiff cites McMurray (sic) v. Prudential Property and Casualty Insurance Co., 458 F. Supp. 209 (E.D. Mich., S.D. 1978) and Ford Motor Co. v. Insurance Co. of North America, 669 F.2d 421 (6th Cir. 1982). As the Defendant has pointed out in the Response to Plaintiff's Motion for Interlocutory Appeal, McMurray (sic) and Ford are not applicable to the facts of the instant case. Neither of the cited cases involves the facts of the case at bar -- an insured bring suit against his own insurance company. The Court in McMurray (sic) distinguished the facts of that case by stating that "the proviso [the "direct action" against insurer provision of 28 U.S.C. §1332(c)] should apply in

no-fault suits, at least in those instances where the named insured is not the plaintiff." McMurray (sic), 458 F. Supp. at 211. (emphasis added).

The Court concludes that the issue raised by the Plaintiff does not involve a "controlling question of law as to which there is substantial ground for difference of opinion." Therefore, the Plaintiff's Motion for Interlocutory Appeal is DENIED.

SO ORDERED, this 21 day of December, 1982.

Orinda D. Evans

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX "F"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C82-1820

JOSEPH ALTON BOWERS

vs.

THE CONTINENTAL INSURANCE COMPANY

ORDER

This Jones-related action is before the Court on the Plaintiff's Motion for Summary Judgment, Defendant's Motion for Declaratory Judgment, and Plaintiff's Request for Oral Argument on Defendant's Motion for Declaratory Judgment and on his Motion for Summary Judgment.

The Plaintiff filed a complaint, seeking to recover $42,419.16 in optional personal injury protection ("PIP") benefits, plus statutory penalties, punitive damages, attorney's fees and costs.

The Defendant filed an answer. The Defendant also filed a counterclaim and request for declaratory judgment that the Plaintiff is not entitled to optional PIP coverage under the two policies issued by Continental Insurance Company to Plaintiff.

On January 11, 1983, the Court stayed proceedings in this suit pending a final decision of the Supreme Court of Georgia in Flewellen v. Atlanta Casualty Company and Van Dyke v. Allstate

Insurance Company. The Court lifted the stay on March 28, 1983, directing both parties to file briefs on any relevant issues. Both parties complied with the Order.

The parties in this suit agree that the two Continental Insurance Company application forms signed by the Plaintiff do not comply with the requirements set forth in Flewellen and Van Dyke. The dispute concerns whether the Plaintiff is entitled to recover optional PIP benefits from the Defendant.

According to the Defendant, the relevant facts are as follows: The Plaintiff applied to the Defendant on February 26, 1976 for a policy of automobile liability insurance.

Following the Plaintiff's application, Continental issued a policy with basic PIP coverage. On July 17, 1979, the Plaintiff applied for a second no-fault insurance policy with basic PIP coverage. The first policy remained in force. On August 24, 1981, the Plaintiff was injured while operating a truck owned by J.A. Bowers Building, Inc. and insured under a policy of commercial automobile insurance issued by the Aetna Insurance Company. As a result of the accident, the Plaintiff received $43,750 in optional PIP benefits under the Aetna policy. On April 26, 1982, the Plaintiff sent a letter to the Defendant, demanding

that Continental pay him $50,000 in PIP benefits.[1] In contrast to the Defendant's statement of the facts, the Plaintiff states that he "has received a total of $43,750 by virtue of a compromise settlement with Aetna Insurance Company for a previous excess no-fault claim which extinguishes the first $50,000.00 of medical benefits due Plaintiff in this case." Plaintiff's Brief in Support of Motion for Summary Judgment at 2. (emphasis added).

As stated above, the issue is whether the Plaintiff may recover additional PIP benefits as a result of

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[1] The Plaintiff demanded $92,419.16 in PIP benefits, until the $50,000 statutory limit of one of the Continental insurance policies was exhausted.

the August 24, 1981 accident above that amount received from Aetna.

First, the Court finds that Mr. Bowers received $43,750 in PIP benefits from Aetna as a result of the August 24, 1981 accident, not as a result of a previous claim. See Plaintiff's Response to Defendant's First Interrogatories and Request for Production of Documents ¶4(c); Exhibit A attached to Defendant's Motion for Declaratory Relief.

Second, the Court concludes that the Plaintiff is not entitled to $50,000 in PIP benefits from Continental Insurance

Company. The Georgia courts and legislature[2] have made it clear that under the circumstances of the instant case, the Plaintiff may not "stack" PIP benefits even if there is no duplication of these benefits. When the Georgia Court of Appeals, in Georgia Casualty & Surety Company v. Waters, et al., 146 Ga. App. 149, 246 S.E.2d 202 (1978), had an opportunity to address the "stacking"

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[2] OCGA §33-34-4(c), formerly Ga. Code Ann. §56-3403b (editoral changes only), provides:

> The total benefits required to be paid under this Code section without regard to fault as the result of any one accident shall not exceed the sum of $5,000.00 per each individual covered as an insured person or such greater amount of coverage as has been purchased on an optional basis as provided in Code Section 33-34-5, regardless of the number of insurers providing such benefits or of the number of policies providing such coverage.

issue, the court concluded: "We find that there is no basis for stacking under the [Georgia Motor Vehicle Accident Reparations Act]." Id. at 151. Although the issue in Waters was whether a party can stack basic PIP benefits, the court gave several examples of the "stacking" problem, one of which is relevant to the instant case:

> Situation 5. A, covered by basic PIP and $45,000 additional PIP, is struck by B with basic PIP plus $20,000 additional PIP. A is covered by B's basic PIP and B's additional PIP up to the limit of that policy. As to amounts in excess of that sum, A's additional PIP then covers up to the limit of A's policy (in this example, the last $25,000 up to an aggregate of $50,000).

See also Georgia Farm Bureau Mutual Insurance Company v. Musgrove, et al., 153 Ga. App. 690, 266 S.E.2d 228 (1980) (court interpreted OCGA §33-34-4(c) as limiting recovery to "the highest amount of additional PIP purchased on any one policy;" id. at 692).[3] Not even where two premiums have been paid can an insured recover more than the "highest

---

[3] The Plaintiff attempts to distinguish Musgrove by pointing out that the policies at issue in Musgrove and the one at issue in the instant case contain different contractual provisions. This Court need not decide whether the contract language in the Continental policy places a limitation on stacking because the Georgia Court of Appeals in Waters found that both the State Farm policy and the Georgia no-fault law prevents "stacking" of benefits. Thus, two independent bases exist for finding that insureds cannot stack PIP benefits.

amount of additional PIP purchased on any one policy." Id.

The Court therefore holds that the Plaintiff, having already recovered $43,750 from Aetna, can recover up to a total of $50,000 optional PIP. That is, he can recover $6,250 from the Defendants, provided he files a proper proof of loss and pays the additional premium.

According to the Defendant, it has received no proof of loss, application for payment of PIP benefits, or additional premium. In contrast, the Plaintiff states that on April 26, 1982, he provided Continental Insurance Company with copies of all his medical bills, which amounted to $92,419.16 at that

time, and that he has paid the amount of $112 as additional premiums due on the two Continental Insurance policies. See Affidavit of Joseph Alton Bowers.

The Court DIRECTS the parties to confer and determine what problem, if any, exists which would prevent the Defendant from now paying the additional PIP benefits in the amount of $6,250 to the Plaintiff. The parties are DIRECTED to submit a status report within 30 days of entry of this Order.

The Court will DEFER ruling on the Plaintiff's request for bad faith penalties, punitive damages and attorney's fees until that time.

Conclusion

The Court DENIES the Plaintiff's Motion for Summary Judgment.

The Court GRANTS the Defendant's Motion for a declaratory relief in part. That is, the Court declares that the Defendant's indebtedness to the Plaintiff as a result of the August 24, 1981 accident cannot as a matter of law exceed $6,250. The Court, however, DEFERS ruling on the Defendant's request that the Court enter an order that the Plaintiff's request for a 25% statutory penalty, attorney's fees, and punitive damages are without merit.

The Court DENIES the Plaintiff's Request for Oral Argument on Defendant's Motion for Declaratory Judgment.

The parties are DIRECTED to submit a status report within 30 days of entry of this Order.

The Clerk is DIRECTED to resubmit this case at that time.

SO ORDERED, this 29 day of September, 1983.

Orinda D. Evans

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX "G"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C82-1820

JOSEPH ALTON BOWERS

vs.

THE CONTINENTAL INSURANCE COMPANY

ORDER

This Jones-related suit is before the court on the Defendant's motion for dismissal of Plaintiff's notice of appeal and the parties' joint motion for extension to file pretrial order.

On October 4, 1983, the court denied the Plaintiff's Motion for Summary Judgment. The court also granted, in part, the Defendant's motion for declaratory relief. Specifically, the court ruled

that the Defendant's indebtedness to the Plaintiff as a result of the August 24, 1981 accident cannot as a matter of law exceed $6,250.[1] The parties were directed to submit a status report within thirty (30) days of entry of the October 4, 1983 Order.

On October 31, 1983, the parties filed a joint status report in which they stipulated that (1) the Plaintiff tendered the necessary premium for optional PIP coverage in the amount of $45,000 under each of the two policies issued to the Plaintiff by the Defendant and (2) the Defendant submitted to the Plaintiff's

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[1] The court, in reaching this decision, concluded that the Plaintiff could not "stack" benefits on his insurance policies.

attorney additional PIP benefits in the amount of $6,250. The parties also stipulated that

> acceptance and negotiation of the aforesaid $6,250 by plaintiff will not be construed as a waiver of any additional benefits or rights to PIP benefits under the policies issued by defendant, including the recovery of a statutory penalty, attorney's fees or punitive damages which plaintiff may claim remain under the policies issued by defendant for the accident of August 24, 1981. By this document defendant is not admitting that it is indebted to plaintiff for PIP benefits in any amount above the sum of $6,250 paid by defendant to plaintiff, but rather, the parties agree and stipulate that this litigation shall continue over those issues which remain in dispute. The payment of $6,250 in PIP benefits has been made to plaintiff by defendant because no dispute exists between the parties as to that portion of plaintiff's claim.

The Plaintiff filed a notice of appeal from the October 4, 1983 Order. The Defendant now moves the court to dismiss the notice of appeal because the October 4 order was not final and is therefore not appealable.

The court agrees the (sic) the October 4 Order was not a final decision. For a decision to be final it must be one which "ends the litigation on the merits and comprehends only execution of the court's decree." Dunlop v. Ledet's Foodliner of Larose, Inc., 509 F.2d 1387,

1389 (5th Cir. 1975).[2] The denial of the Plaintiff's motion for summary judgment was not a final decision and is therefore non-appealable. See In re Yarn Processing Patent Validity Litigation, 541 F.2d 1127, 1138 (5th Cir. 1976), cert. denied, 433 U.S. 910 (1977). The granting, in part, of Defendant's motion for declaratory relief was also not a final decision because the issue of whether the Plaintiff is entitled to statutory penalties, punitive damages, and attorney's fees was reversed. Cf. National Corn Growers Association, Inc. v. Bergland, 611 F.2d 730, 733 (8th Cir.

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[2] Decisions of the Fifth Circuit handed down prior to September 30, 1981 are binding precedent unless overruled or modified by the Eleventh Circuit en banc. Bonner v. City of Prichard, 661 F.2d 1206, 1209-10 (11th Cir. 1981).

1980) (per curiam) (declaration of rights not an appealable order, in absence of permissive interlocutory appeal under §1292(b), when claims to injunctive relief or damages remain); Beare v. Briscoe, 498 F.2d 244 244-45 n.1 (5th Cir. 1974) (per curiam) (no appealable order in absence of permissive interlocutory appeal under §1292(b) when declaratory judgment did not take care of whole case).

The timely filing of a notice of appeal ordinarily divests the district court of jurisdiction with respect to any matters involved in the appeal. See Taylor v. Sterrett, 640 F.2d 663, 667 (5th Cir. 1981). However, when the notice of appeal is deficient because it

refers to a non-appealable order, the majority of courts, including this circuit, hold that the district court may disregard the notice and proceed with the case. See United States v. Hitchmon, 602 F.2d 689 (5th Cir. 1979) (en banc); accord Cochran v. Birkel, 651 F.2d 1219 (6th Cir.), cert. denied, 454 U.S. 1152 (1981); Arthur Anderson & Company v. Finesilver, et al., 546 F.2d 338 (10th Cir. 1976), cert. denied, 429 U.S. 1096 (1977); Hodgson v. Mahoney, 460 F.2d 326 (1st Cir. 1972) (per curiam), cert. denied, 409 U.S. 1039 (1973); Ruby v. Secretary of United States Navy, 365 F.2d 385 (9th Cir. 1966) (en banc), cert. denied, 386 U.S. 1011 (1967); 9 Moore's Federal Practice ¶203.11 at 3-51,-52

(1983). According to some courts, the notice of appeal is then deemed to be a nullity. E.g., Century Laminating, Ltd. v. Montgmery, 595 F.2d 563 (10th Cir.), cert. granted, 444 U.S. 897, cert. dismissed, 444 U.S. 987 (1979). Thus, the Plaintiff's filing of a notice of appeal did not divest the court of jurisdiction in the instant case. The court is therefore now able to address the unresolved issue of whether the Plaintiff is entitled to statutory penalties, punitive damages, and attorney's fees.

The relevant statutory provisions provide:

* * *

(b) Benefits required to be paid without regard to fault shall be payable monthly as loss accrues. The benefits are overdue if not paid within 30 days after the insurer received reasonable proof of the fact and the amount of loss sustained. If reasonable proof of loss is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after proof is received by the insurer. For the purpose of calculating the extent to which any benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail or to the last known address in a properly addressed, postpaid envelope, or if not so posted, on the date of delivery.... In the event the insurer fails to pay each benefit when due, the person entitled to the benefits

> may bring an action to recover them and the insurer must show that its failure or refusal to pay was in good faith, otherwise the insurer shall be liable for a penalty not exceeding 25 percent of the amount due and reasonable attorneys fees.
>
> (c) In addition..., in the event that an insurer fails or refuses to pay a person the benefits which the person is entitled to...within 60 days after proper proof of loss has been filed, the person may bring an action to recover the benefits; and, if the insurer fails to prove that its failure or refusal to pay the benefits was in good faith, the insurer shall be subject to punitive damages.

O.C.G.A. §33-34-b(b),(c). The test under this statutory provision is one of good faith of the insurer; the burden of proving such good faith is on the insurer. Bituminous Casualty Corporation

v. Mowery, 145 Ga. App. 45, 244 S.E.2d 573 (1978).

There is no bad faith where a doubtful question of law is involved. Brown v. Seaboard Lumber and Supply Company, 221 Ga. 35, 142 S.E.2d 842 (1965). "Bad faith" on the part of an insurance company is a "frivolous and unfounded denial of liability." State Farm Mutual Automobile Insurance Company v. Harper, 125 Ga. App. 696, 188 S.E.2d 813 (1972). In other words, an insurance company is not acting in bad faith if there is any reasonable ground for contesting liability. American Casualty Company v. Ten Tex Corporation, 357 F.2d 269, 271 (5th Cir. 1958). If the insurer's defense or reason for not

paying the benefits demonstrates a "reasonable and probable cause" for refusing payment, then this defense legally vindicates the good faith of the company. Mowery, 145 Ga. App. at 45, 244 S.E.2d at 573.

Until recently, Continental Insurance Company apparently believed that the Plaintiff received $50,000 in PIP benefits under the Aetna Insurance Company policy. Because the Defendant believed that the Plaintiff had recovered "the full amount authorized by law," see Defendant's Response to Order at 3, it concluded that it need not extend optional PIP coverage. The court hereby holds that the Defendant's failure to

extend the optional PIP coverage and pay the PIP benefits was in good faith.[3] The Plaintiff is therefore not entitled to the statutory penalties, punitive damages, and attorney's fees. Having so concluded, the court GRANTS the Defendant's Motion for a declaratory judgment that the Plaintiff's request for statutory penalties, punitive damages, and attorney's fees are without merit.

The Clerk is DIRECTED to enter final judgment in favor of the Defendant.

The Defendant's Motion for dismissal of Plaintiff's notice of appeal is

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[3] Although the issue of good or bad faith of the insurer is ordinarily for the jury, there are instances in which the issue is one of law for the court. See, e.g., Government Employees Insurance Company v. Mooney, No. 39193 (Ga. Sup. Ct. March 16, 1983).

DISMISSED as moot. The joint motion for extension to file pretrial order is DISMISSED as moot.

SO ORDERED, this 11 day of January, 1984.

Orinda D. Evans

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX "H"

JUDGMENT ON DECISION BY THE COURT

FOR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA - ATLANTA DIVISION

JOSEPH ALTON BOWERS

vs.

THE CONTINENTAL INSURANCE COMPANY

Civil Action Docket No. C82-1820A

JUDGMENT

This action came on for consideration before the court, United States District Judge Orinda D. Evans presiding. The issues having been duly considered and a decision having been duly rendered, it is ordered and adjudged that the plaintiff take nothing, that the action be dismissed, and that the defendant THE

CONTINENTAL INSURANCE COMPANY recover of the plaintiff JOSEPH ALTON BOWERS its costs of action.

FILED & ENTERED IN CLERK'S OFFICE THIS
13TH DAY OF JANUARY, 1984
BEN H. CARTER, CLERK

By: Mary J. Watson
Deputy Clerk

Dated at: Atlanta, Georgia
Date: January 13, 1984

BEN H. CARTER, CLERK

By: Mary J. Watson
Deputy Clerk

APPENDIX "I"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action Docket No. C82-1820A

JOSEPH ALTON BOWERS

vs.

THE CONTINENTAL INSURANCE COMPANY

NOTICE OF APPEAL

Notice is hereby given that Joseph Alton Bowers, plaintiff in the above-styled case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order of the United States District Court for the Northern District of Georgia, Atlanta Division, entered October 4, 1983, which Order

denied plaintiff's Motion for Summary Judgment and granted defendant's Motion for Declaratory Relief. The Clerk will omit nothing from the record on appeal.

This 1 day of November, 1983.

ZUSMANN, SMALL, STAMPS & WHITE

By: Ronald A. Lowry
Ronald Arthur Lowry
Attorney for Plaintiff,
Joseph Alton Bowrs

ZUSMANN, SMALL, STAMPS & WHITE
2964 Peachtree Road N.W.
Suite 500
Atlanta, Georgia 30305

APPENDIX "J"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action Docket No. C82-1820A

JOSEPH ALTON BOWERS

vs.

THE CONTINENTAL INSURANCE COMPANY

NOTICE OF APPEAL

Notice is hereby given that JOSEPH ALTON BOWERS, plaintiff in the above-styled case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order of the United States District Court for the Northern District of Georgia, Atlanta Division, entered January 13, 19834 which Order

granted Defendant's Motion to Strike Plaintiff's Request for Statutory Penalties, Punitive Damages, and Attorney's Fees and entered final judgment in favor of the Defendant. The Clerk will omit nothing from the record on appeal.

Notice is further given of a related appeal in the above referenced case, filed November 1, 1983, being U.S.C.A. No. 83-8787.

This 24th day of January, 1984.

ZUSMANN, SMALL, STAMPS & WHITE
A Professional Corporation
Attorney for Plaintiff

By: Ronald A. Lowry
Ronald Arthur Lowry

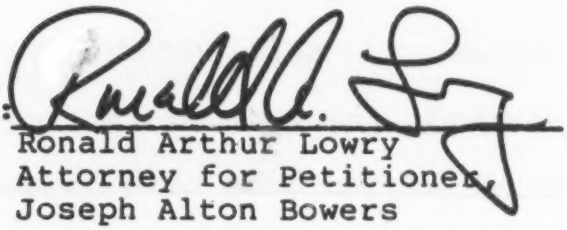
2964 Peachtree Road, N.W.
Suite 500
Atlanta, Georgia 303[illegible]
(404) 237-0071

STATEMENT

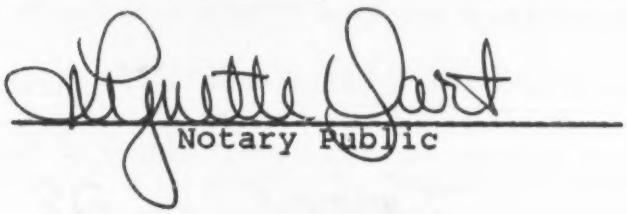
Pursuant to Rule 28.2 of the Rules of the Supreme Court, this statement certifies that the original and forty copies of a Supplemental Appendix to Petition for Writ of Certiorari in the above styled case were deposited in a United States post office or mailbox, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States. This mailing took place in Atlanta, Georgia on the afternoon of TUESDAY, May 28, 1985, within the time permitted by the

Rules of the Supreme Court for the filing of a Petition for a Writ of Certiorari in this case.

Respectfully submitted,

By: 
Ronald Arthur Lowry
Attorney for Petitioner,
Joseph Alton Bowers

Sworn to and subscribed before
me this 28th day of May, 1985.


Notary Public

Notary Public, Georgia, State at Large
My Commission Expires June 3, 1986

CERTIFICATE OF SERVICE

This is to certify that I have this date served three copies of the foregoing SUPPLEMENTAL APPENDIX upon the United States Court of Appeals for the Eleventh Circuit, 50 Spring Street, S.W., Atlanta, Georgia 30303-3147, and upon William S. Sutton, attorney for Appellee, Continental Insurance Company, McClain & Merritt, P.C., 1250 Tower Place, Atlanta, Georgia 30026-3901 by depositing same in

the United States Mail in a properly addressed envelope with adequate postage thereon.

This 28 day of May, 1985.

By: Ronald Arthur Lowry
Attorney for Petitioner,
Joseph Alton Bowers

Sworn to and subscribed before me this 28th day of May, 1985.

Notary Public

Notary Public, Georgia, State at Large
My Commission Expires June 3, 1986

Office-Supreme Court, U.S.
FILED
JUN 8 1985
ALEXANDER L. STEVAS,
CLERK

(3)

NO. 84-1787

IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1985

JOSEPH ALTON BOWERS

Petitioner

versus

THE CONTINENTAL INSURANCE COMPANY

Respondent

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI FROM A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

M. David Merritt
William S. Sutton
McLAIN & MERRITT, P.C.
1250 Tower Place
Atlanta, Georgia 30026-3901
(404) 266-9171

BEST AVAILABLE COPY

43 pp

STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

(1) Whether a lawsuit for payment of optional personal injury protection (no fault) benefits by a policy holder against his own insurance carrier is a "direct action" as defined at Title 28, United States Code §1332(c).

(2) Whether plaintiff was entitled under the Georgia Motor Vehicle Accident Reparations Act, O.C.G.A. Ch. 34, to stack optional personal injury protection (no fault) benefits and to recover an amount greater than the highest coverage purchased in any one policy.

(3) Whether the trial court erred in ruling that plaintiff, as a matter of law, was not entitled to recover bad faith penalties, attorney's fees

and punitive damages under O.C.G.A. §33-34-6(b)(c).

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STATEMENT OF THE CASE

FACTUAL BACKGROUND

On February 26, 1976, plaintiff, Joseph Alton Bowers, applied to defendant for a policy of automobile liability insurance. Defendant issued plaintiff Policy No. 31P 0922 0743 with aggregate personal injury protection limits of $5,000.00.

On July 17, 1979, plaintiff applied to defendant for a second policy of automobile liability insurance and was issued Policy No. 31P 0970 8187 with aggregate personal injury protection limits of $5,000.00.

Both of the policies issued by defendant to plaintiff were in full force and effect on August 24, 1981, when plaintiff was injured while operating a truck owned by J. A. Bowers Builders, Inc. The truck being driven by plaintiff on

August 24, 1981, was insured under a policy of commercial automobile insurance issued to J. A. Bowers Builders, Inc., by the Aetna Insurance Company. As a result of the accident of August 24, 1981, plaintiff received the sum of $43,750.00 in personal injury protection benefits from the Aetna Insurance Company under the policy of insurance issued to J. A. Bowers Builders, Inc.

By letter dated April 26, 1982, plaintiff demanded defendant pay him $92,419.16 in optional personal injury protection benetifs as a result of the aforesaid accident of August 24, 1981. Defendant did not receive an accompanying proof of loss or an additional premium for the optional benefits demanded by plaintiff.

Defendant subsequently paid plaintiff personal injury protection benefits in the amount of $6,250.00.

SUMMARY OF THE ARGUMENT

1. Diversity is not precluded where a lawsuit is brought by an insured against his insurer for failure to meet policy obligations. Title 28, United States Code §1332(c) is applicable only to actions brought against insurers as payor of judgments based on negligence of one of their insureds. Dairyland Insurance Co. v. Makeover, 654 F2d 1120, 1125 (5th Cir. 1981).

2. The Georgia appellate courts have ruled that personal injury protection (no fault) benefits required to be paid under the Georgia Motor Vehicle Accident Reparations Act shall not exceed basic benefits of $5,000.00 and such greater amount of optional

coverage as has been purchased under any one policy. Voyager Casualty Insurance Co. v. King, 172 Ga. App. 269, 323 SE2d 4 (1984) cert denied No. 41655 (Ga. Nov. 6, 1984).

3. Where an insured's demand for payment of personal injury protection (no fault) benefits is excessive or unjust the insurer cannot be penalized for failure to meet the insured's demand. Georgia Farm Bureau & Insurance Co. v. Pendley, 155 Ga. App. 674, 677-678, 272 SE2d 566 (1980). In the present case, plaintiff's uncompromising demand for payment of $45,000.00 under each of the two policies of automobile insurance issued by defendant was excessive and defendant's belief that plaintiff had recovered basic personal injury protection (no fault) benefits of $5,000.00 and optional personal injury protection (no fault)

benefits of $45,000.00 from Aetna was reasonable and in good faith. Cf, Baron v. State Farm Mutual Automobile Insurance Co., 157 Ga. App. 16, 20, 276 SE2d 78 (1981).

ARGUMENT AND CITATION OF AUTHORITY

A.

AN ACTION BY A POLICY HOLDER AGAINST HIS OWN INSURANCE CARRIER FOR PAYMENT OF NO FAULT BENEFITS IS NOT A DIRECT ACTION WITHIN THE MEANING OF TITLE 28, UNITED STATES CODE §1332(c).

Plaintiff's contention that defendant's removal of his complaint from the State Court of DeKalb County, Georgia to the United States District Court for the Northern District of Georgia should have been remanded is based on Title 28, United States Code §1332(c). See also, Ford Motor Co. v. Insurance Company of North America, 669 F2d 421 (6th Cir. 1982) and McMurray v. Prudential Property and Casualty Insurance Co., 458 F.Supp. 209 (ED Mich. 1978). Specifically plaintiff argues (1) that his suit against

Continental was a "direct action" within the meaning of Title 28, United States Code §1332(c), and (2) that since he, as the named insured, is not a party defendant to the suit, his residence is imputed to defendant Continental Insurance Company and diversity destroyed.

Title 28, United States Code, §1332(c) in pertinent part states:

> "Provided further, that in any direct action against the insurer on a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business."

As was recognized by the Circuit Court plaintiff's argument appears at first glance to be supported by the literal language of the statute. Bowers v.

Continental Insurance Co., ___F2d ____ (11th Cir. 2/27/85) (Nos. 83-8787, 84-8084) at p. 2246. The Court pointed out, however, that plaintiff's argument for removal was not supported by either the legislative history of Title 28, United States Code §1332(c) or by existing authority.

Title 28, United States Code, Section 1332(c), was enacted by Congress in response to "direct action" statutes enacted in Louisiana and Wisconsin and "refers only to cases brought by an alleged victim of a tort under a 'direct action' statute against the liability insurer of the alleged tortfeasor." White v. United States Fidelity & Guaranty Co., 356 F2d 746, 747 (1st Cir. 1966); Newson v. Zurich Insurance Co., 397 F2d 280 (5th Cir. 1968).

"The purpose of the proposed

> legislation is to amend section 1332(c) of Title 28, United States Code, so as to eliminate under the diversity of jurisdiction of the United States district courts, suits on certain tort claims in in which both parties are local residents, but which under a state 'direct action' statute, may be brought directly against a foreign insurance carrier without joining the local tort-feasor as a defendant." White v. United States Fidelity & Guaranty Co., supra, at 747, quoting Senate Report No. 1308, 88th Congress, 2d Session, 1 U.S. Code Cong. & Admin. News, 1964, p. 2278 (1964); See also, Torres v. Hartford Insurance Co., 588 F2d 848, 849-850 (1st Cir. 1978).

The "direct action" restriction contained in §1332(c) was clearly not intended to apply to suits brought by insureds against their own insurer. Several courts have made this explicit by holding that a suit by an insured against his own insurance company is not a "direct action" within the meaning of Title 28, United States Code §1332(c).

Eg., White v. United States Fidelity & Guaranty Co., 356 F2d, at 747-748; Spooner v. Paul Revere Life Insurance Co., 578 F.Supp. 369, 373 (ED Mich. 1984); Fidelity and Deposit Co. v. Southern Utilities, Inc., 542 F.Supp. 692, 693 (MD Ga. 1981); O'Hanlon v. Hartford Accident and Indemnity Co., 439 F.Supp. 377, 380 (D. Del. 1977); Adams v. State Farm Mutual Automobile Insurance Co., 313 F.Supp. 1349 (ND Miss. 1970); Bishop v. Allstate Insurance Co., 313 F.Supp. 875 (WD Ark. 1970).

While some courts have expanded Section 1332(c) to reach beyond policies of automobile insurance, it has never been applied where a policy providing other than "liability" coverage was involved, or where the action was other than a "direct action" within the meaning of the statute. See, Hernandez v.

Travelers Insurance Co., 489 F2d 721, 724, n. 1 (5th Cir. 1973) where Section 1332(c) was applied to a policy providing workers' compensation coverage but the court in dicta stated that §1332(c) would not be applicable to destroy diversity where a suit is brought by an "insured"; Velez v. Crown Life Insurance Co., 599 F2d 471, 473 (1st Cir. 1979) where Court said that diversity is not precluded where a suit is brought against an insurer for failure to meet policy obligations except where the action is brought against the insurer as payor of a judgment based on negligence of one of its insureds; Dairyland Insurance Co. v. Makeover, 654 F2d 1120, 1125 (5th Cir. 1981), citing White v. United States Fidelity & Guaranty Co., 356 F2d 746, 747 (1st Cir. 1966) where the Court said that §1332(c) is not applicable if the plaintiff is the insured; and

Newsom v. Zurich Insurance Co., 397 F2d 280 (5th Cir. 1963) where the Court said that the purpose of §1332(c) was clearly to prevent the use of "direct action" statutes as vehicles to get insurers into federal court where both the plaintiff and the insured are residents of same state.

Plaintiff's position is not even supported by the holdings of those cases cited in his brief. See, Ford Motor Co. v. Insurance Company of North America, 669 F2d 421 (6th Cir. 1982); McMurray v. Prudential Property and Casualty Insurance Co., 458 F.Supp. 209 (ED Mich. 1978).

Ford Motor Co. v. Insurance Company of North America was an action against a resident tortfeasor's nonresident insurance carrier and did not involve an insured suing his own insurer. 669 F2d 421. Similarly, McMurry v. Prudential Property and Casualty Insurance Co., was

a suit by an injured automobile passenger against the owner-driver's insurance carrier. 458 F.Supp. 209 at 211. In both cases the Michigan No Fault Statute acted as a substitute for liability coverage.

The district court in McMurray made it explicitly clear that it was not extending the scope of Title 28, United States Code §1332(c) beyond existing authority by stating that "(t)he proviso [§1332(c)] should apply in no fault suits, at least where the named insured is not the plaintiff." 458 F.Supp. at 211. Plaintiff's argument also fails to consider that the facts of the present case are practically identical to those of another Michigan case in which the same court that decided McMurray held that an action for no fault benefits brought by an "insured" was not a "direct

action" within the meaning of Title 28, United States Code §1332(c). Watkins v. Allstate Insurance Co., 503 F.Supp. 848, 851 (ED Mich 1980).

Plaintiff has failed to show either that the Courts below have misapplied existing authority or that the construction given Title 28, United States Code §1332(c) by the Eleventh Circuit Court of Appeals is inconsistent with that of another circuit. Plaintiff's action was not a suit brought under a policy of liability insurance by a party injured as the result of an insured's negligence (or act) but was instead an action brought by a named insured to which §1332(c) is not applicable.

B.

PLAINTIFF WAS NOT ENTITLED TO RECOVER PERSONAL INJURY PROTECTION (NO FAULT) BENEFITS IN EXCESS OF $50,000.00 FOR THE ACCIDENT OF AUGUST 24, 1981.

The heart of the proceedings below involve not plaintiff's contention that the complaint should be remanded to the State Court of DeKalb County but instead plaintiff's demand that he recover optional personal injury protection (no fault) benefits of $45,000.00 under each of two policies of personal automobile insurance

issued by defendant.[1] The facts essential for resolution of this issue were undisputed and the law clear. See, Voyager Casualty Insurance Co. v. King, 172 Ga. 269, 323 SE2d 4 (1984) cert denied No. 41655 (Ga. Nov. 6, 1984).

Plaintiff was injured on August 24, 1981, while driving a truck owned by J. A. Bowers Builders, Inc. At the time of the accident plaintiff was named as an insured in two policies of personal automobile insurance issued by defendant, as well as being provided coverage by a

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1 The Georgia Motor Vehicle Accident Reparations Act in effect on August 24, 1981, provided a statutory scheme which required that all policies of automobile liability insurance issued in Georgia contain basic personal injury protection (no fault) coverage of $5,000.00 and offer the named insured an opportunity to accept or reject in writing optional personal injury protection (no fault) coverage with aggregate limits of up to $50,000.00. O.C.G.A. §33-34-5 (Ga. Code Ann. §56-34046)

policy of automobile insurance issued by the Aetna Insurance Company to J. A. Bowers Builders, Inc.[2] Each of the three policies provided basic personal injury protection (no fault) coverage of $5,000.00 and optional personal injury protection (no fault) coverage of $45,000.00.[3] After the accident plaintiff was paid personal injury protection benefits in the total amount of

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2 Under Georgia law the insurance policy insuring the automobile in which an injured person is riding has primary coverage. Baron v. State Farm Mutual Automobile Insurance Co., 157 Ga. App. 16, 20, 276 SE2d 78 (1981). Policies on other vehicles which name the injured party as an insured are treated as providing secondary coverage.

3 The optional coverage was provided as the result of the decision of the Georgia Supreme Court in Flewellen v. Atlanta Casualty Insurance Co., 250 Ga. 709, 712, 300 SE2d 673 (1983).

$50,000.00.[4]

Defendant does not contest plaintiff's right to recover basic personal injury protection (no fault) benefits of $5,000.00 plus optional personal injury protection (no fault) benefits of $45,000.00 as a result of the accident of August 24, 1981. In fact, defendant's response to plaintiff's motion for summary judgment conceded as much. Defendant does contest plaintiff's right to recover personal injury protection (no fault) benefits in excess of $50,000.00.

Plaintiff's contention that the Georgia Motor Vehicle Accident Reparations Act should be interpreted to allow the

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4 Aetna paid basic personal injury protection (no fault) benefits of $5,000.00 plus optional personal injury protection (no fault) benefits of $38,750.00. Defendant completed the payment of $50,000.00 by paying plaintiff optional personal injury protection (no fault) benefits of $6,250.00.

stacking or pyramiding of optional personal injury protection (no fault) coverages has been previously reviewed by the appellate courts of Georgia and rejected. Voyager Casualty Insurance Co. v. King, 172 Ga. App. 269, 271, 323 SE2d 4 (1984) cert denied No. 41655 (Ga. Nov. 6, 1984). See also, Georgia Farm Bureau Mutual Insurance Co. v. Musgrove, 153 Ga. App. 690, 691-692, 266 SE2d 228 (1980); and Georgia Casualty & Surety Co. v. Waters, 146 Ga. App. 149, 246 SE2d 202 (1978).

In support of his attempt to stack optional personal injury protection (no fault) benefits plaintiff cites no favorable Georgia authority but instead makes extensive reference to factually distinguishable cases from other jurisdictions. See, Yamaguchi v. State Farm Mutual Automobile Insurance

Co., 515 F.Supp. 186 (Hawaii 1980); and Belk v. Nationwide, 244 SE2d 744 (S.C. 1978). With all due deference to those courts which decided the cases cited by plaintiff, defendant believes that the decision of the Georgia appellate courts prohibiting the stacking of optional personal injury protection (no fault) benefits properly interprets the Georgia Motor Vehicle Accident Reparations Act and specifically O.C.G.A. §33-34-4(c).

The decision in Voyager relied upon O.C.G.A. §33-34-4(c) which states:

> "The total benefits required to be paid under this Code section without regard to fault as a result of any one accident shall not exceed the sum of $5,000.00 per each individual covered as an insured person or such greater amount of coverage as has been purchased on an optional basis as provided in Code Section 33-34-5, regardless of the number of insurers providing such benefits or of the number of policies

providing such coverage" (Ga. Code Ann. §56-3403b)

and held that the Georgia Motor Vehicle Accident Reparations Act indicates a clear legislative intent to prohibit the stacking of both basic and optional personal injury protection (no fault) coverages. Ibid at 270.

Absent a finding that the interpretation given O.C.G.A. §33-34-4(c) in Voyager Casualty Insurance Co. v. King was fundamentally unfair, its application by the Eleventh Circuit Court of Appeals in this case leaves nothing to review. See, Gooding v. Wilson, 405 US 518, 92 SCt 1103, 31 LEd2d 408 (1972); CIR v. Bosch's Estate, 387 US 456, 87 SCt 1776, 18 LEd2d 886 (1967); Allen v. A.G. Edwards & Sons, 606 F2d 84 (5th Cir 1979); Eason v. Weaver, 557 F2d 1202 (5th Cir 1977); Kincaid Cotton Co. v. Kesey Bros., 504 F2d 876 (5th Cir 1974).

C.

THE TRIAL COURT'S RULING THAT PLAINTIFF WAS NOT ENTITLED TO RECOVER A STATUTORY PENALTY, ATTORNEY'S FEES OR PUNITIVE DAMAGES WAS CORRECT.

Plaintiff alleges that the trial court's ruling that he was not entitled as a matter of law to recover a statutory penalty, attorney's fees and punitive damages under O.C.G.A. §33-34-6(b)(c) was error. Georgia law requires that personal injury protection (no fault) benefits be paid within thirty days after an insurer receives reasonable proof of loss. If benefits are not paid within thirty days after receipt of reasonable proof of loss the insured may bring an action to recover the benefits and the insurer must show that its failure or refusal to pay was in

good faith, otherwise the insurer is liable for a penalty not exceeding 25 percent of the amount due plus reasonable attorney's fees. O.C.G.A. §33-34-6(b). In the event an insurer fails or refuses to pay personal injury protection (no fault) benefits for more than sixty days after receipt of reasonable proof of loss Georgia law provides that the insured may file an action to recover the benefits due, and if the insurer fails to prove that its failure or refusal to pay benefits was in good faith, the insured may seek to recover punitive damages in addition to a statutory penalty not to exceed 25 percent and reasonable attorney's fees. O.C.G.A. §33-34-6(c).

The standard applicable to O.C.G.A. §33-34-6(b)(c) is the good faith of the insurer and the burden of proving good

faith is on the insurer.[5] See, Bituminous Casualty Corp. v. Mowery, 145 Ga. App. 45 244 SE2d 573 (1978). If an insurer can show a reasonable and probable cause for its failure to pay benefits within the statutory periods of time the insurer's defense legally vindicates its good faith. Ibid at 45. Bad faith on the part of an insurer has been described as a "frivolous and unfounded denial of liablity." State Farm Mutual Automobile Insurance Co. v. Harper, 125 Ga. App. 696, 701, 188 SE2d 813 (1972). See also, Georgia Farm Bureau Mutual Insurance Co. v. Pendley, 155 Ga. App. 674, 677, 272 SE2d 566 (1980).

Plaintiff's contention is that defendant was provided reasonable proof of loss

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In interpreting O.C.G.A. §33-34-6, and its application to no fault insurers, Georgia courts have examined cases construing O.C.G.A. §33-4-6, a similar law applying generally to bad faith refusals of insurers to pay benefits.

on April 26, 1982 and failed to pay even the $6,250.00 ultimately found owing by the district court within the statutorily prescribed periods of time.[6] Plaintiff relies generally on those cases which hold that the question of an insurer's good faith is usually for the jury. E.g., Georgia Farm Bureau Mutual Insurance Co. v. Pendley, 155 Ga. App. 674, 677, 272 SE2d 566 (1980).

Plaintiff's argument overlooks equally applicable cases which support the district court's decision to deny

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To avoid imposition of bad faith penalties defendant must show good faith for its failure to pay benefits between the date of plaintiff's original demand, April 26, 1982 and the date plaintiff filed suit, July 27, 1982. Georgia law provides that the statutory 30 and 60 day periods must lapse before the date suit is filed. A period of bad faith failure to pay benefits after suit is filed is insufficient. See, E.g., Life Insurance co. v. Burke, 219 Ga. 214, 222, 132 SE2d 737, 742 (1963); Doran v. Travelers Indemnity Co., _____ Ga. _____, _____ SE2d _____ No. 41550 (Ga. Feb. 27, 1985) p. 7.

statutory bad faith penalties and punitive damages. See, Georgia Farm & Insurance Co. v. Pendley, 155 Ga. App. 674, 677-678, 272 SE2d 566 (1980) where the court held that when a demand for payment of no fault benefits is unjust or the amount claimed excessive, the insurer cannot be penalized for refusing to comply with the demand; American Interstate Insurance Co. v. Revis, 156 Ga. App. 204, 205, 274 SE2d 586 (1980); Georgia Farm & Insurance Co. v. Matthews, 149 Ga. App. 350, 352, 254 SE2d 413 (1979); and Allstate Insurance Co. v. Torok, 168 Ga. 517, 519, 309 SE2d 676 (1983).

Plaintiff's argument also overlooks that the trial court's finding that "until recently Continental Insurance company apparently believed that plaintiff had received $50,000.00 in PIP benefits under the Aenta Insurance Company policy" was undisputed in the proceedings below, as

well as being supported by applicable Georgia case law. See, Baron v. State Farm Mutual Automobile Insurance Co., 157 Ga. App. 16, 21, 276 SE2d 78 (1981) (an injured person must exhaust the PIP limits of the policy covering the car in which he was riding when injured before seeking payment of PIP benefits under his personal policy).

In the present case plaintiff failed to exhaust the personal injury protection (no fault) coverage provided by the Aetna policy before demanding payment of benefits from defendant. Instead of exhausting the Aetna coverage limits, plaintiff accepted a payment of less than the full personal injury protection (no fault) coverage provided by Aetna and then demanded an amount from defendant which has since been held to have been excessive. See, Georgia Farm Bureau Mutual Insurance

Co. v. Pendley, 155 Ga. App. 674, 677, 272 SE2d 566 (1980).

The district court acted properly in denying plaintiff's request for statutory penalties and punitive damages under O.C.G.A. §33-34-6(b)(c).

CONCLUSION

For all the foregoing reasons, and because the instant Petition for a Writ of Certiorari does not present an issue of the nature enunciated in this Court's Rule 17, Continental Insurance Company, defendant in the proceedings below, respectfully submits that the Petition for Writ of Certiorari filed by Joseph Alton Bowers should be denied.

McLAIN & MERRITT, P.C.

BY: M. David Merritt
M. DAVID MERRITT

BY: William S Sutton
WILLIAM S. SUTTON

APPENDIX

Sufficient Appendicies have been filed as part of plaintiff's Petition for Writ of Certiorari.

CERTIFICATE OF SERVICE

This is to certify that I have this day served three copies of the foregoing Opposing Petition for Writ of Certiorari From a Decision of the United States Court of Appeals for the Eleventh Circuit upon Ronald Arthur Lowry, attorney for Petitioner, Joseph Alton Bowers, Zushmann, Small, Stamps & White, A Professional Corporation, Post Office Box 53483, Atlanta, Georgia 30355 by depositing same in the United States Mail in a

properly addressed envelope with adequate postage thereon.

This 5 day of June, 1985.

By: M. David Merrit

M. David Merrit
Attorney for Respondent
The Continental
Insurance Company

Sworn to and subscribed before me this 5th day of June, 1985.

Brenda P. Wise

Notary Public

Notary Public, Georgia, State at Large
My Commission Expires Nov. 28, 1988

STATEMENT

Pursuant to Rule 28.2 of the Rules of the Supreme Court, this statement certifies that the original and forty copies of a brief opposing petition for writ of certiorari from a decision of the United States Court of Appeals for the Eleventh Circuit in the above styled case were deposited in a United States post office or mailbox, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States. This mailing took place in Atlanta, Georgia on Wednesday, June 5, 1985, within the time permitted by the Rules of the Supreme Court for the

filing of a brief opposing a petition for a writ of certiorari in this case.

Respectfully submitted,

By: M. David Merritt

M. David Merritt
Attorney for Respondent
The Continental
Insurance Company

Sworn to and subscribed before me this 5th day of June, 1985.

Brenda P. Wise

Notary Public

Notary Public, Georgia, State at Large
My Commission Expires Nov. 28, 1988